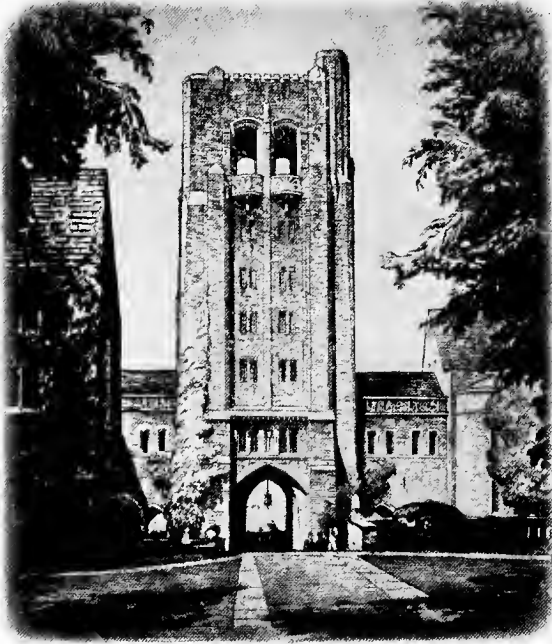


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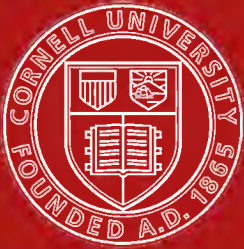
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1900 to 1906

THE

BAHAMAS

LAW REPORTS.

VOL. I.

SUPREME COURT

AND

MAGISTERIAL COURT CASES.

EDITED BY KENNETH SOLOMON A MEMBER OF THE
BAHAMAS BAR.

1906.

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IN THE SUPREME COURT.

EQUITY SIDE.

1900, No. 6.

IDA MOORE WELLS v. LEWIS WELLS.

*Statute of Limitations—Imperial Act 3 & 4 Will. 4. c. 27. s. s. 2. 16.
and Bahama Act 9 Vict. c. 9.—Imperial Real Property Limitation
Act 1874 and Bahama Act 40 Vic. c. 2—Disability—Infancy—
Possession of person treated as Quasi Guardian and his Lia-
bility to Account.*

1900

October.

The plaintiff who is the only child of J. J. W. and S. his wife, was born on 9th Oct. 1865. Her father had not been seen or heard of since Oct. 1866. She claimed that at this time he was in possession of certain real estate. The defendant is the plaintiff's uncle, and is in possession of, and has received the rents and profits from, the said real estate during the minority of the plaintiff and up to the present time:—

Held, that on the facts set out in the Statement of Claim, the entry of the defendant could not be considered as that of a stranger, and must be taken to have been as guardian of the infant plaintiff; and that the Statutes, therefore, could not be set up:

Held, further, on the evidence, that the plaintiff's father did not die possessed of the land; and that the defendant did not enter into possession after, but before, his death.

SIR O. D. MALCOLM, C. J. The plaintiff brings this action against the Defendant to obtain from this Court:

1. A declaration that the Defendant is in possession of certain real estate situated on Long Island, as trustee for her.
2. An account of the rents and profits received from these lands by the Defendant from the time of his entering into possession.
3. A decree for the payment to the Plaintiff of the amount found to be due to her on taking such account.
4. A decree for the delivery to the Plaintiff of possession of such land.

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The writ in the action was issued on the 29th April, 1900.

The statement of claim upon which the action is based sets out the following allegations which I have condensed as follows.

1. That Plaintiff is the only child of John James Wells and Sophronia Wells his wife.

2. That Plaintiff was born on the 9th October, 1865.

3. That John James Wells was lost at sea in or about the month of October 1866.

4. At the time of his death the said John James Wells was possessed of certain real estate on Long Island describing it as,

A tract of 500 acres originally granted to George Gray, giving the boundaries

and

A tract of 314 acres contiguous to the 500 acre tract and also originally granted to George Gray.

5. That Defendant is the brother of John James Wells.

6. That after the death of John James Wells, the Defendant entered into and took possession of the said real estate.

7. That defendant still continues in possession of such real estate.

This statement of claim was filed on the 30th July, 1900.

The Defendant, in answer to the Plaintiff's statement of claim, filed his defence in the short form given in Wilson's practice at p. 581, and under the rule 216 of this Court.

No other pleadings were filed and the cause was set down for hearing before me without a Jury, on the 4th October instant.

On that day, on the suggestion of the Counsel in the cause, it was agreed that an argument should be held upon a point of law to be raised by the Defendant's Counsel as to the right of the Plaintiff to maintain her action assuming that the facts set out in her statement of claim were proven to be true.

The point raised by the Defendant's Counsel on the argument was that of the Statutes of Limitation and in support of that position the following authorities were cited :

3 and 4 Wm. 4, c. 27, secs. 2, 16.
Real Property Limitation Act 1874.

A further contention was raised that it was only in cases of express trusts that an action could be brought after the expiration of the time limited for bringing it under the statute—

25 sec. 3. and 4 Wm. 4, c. 27.
Lewin on Trusts.
Banner v. Berridge 18 L. R. Eq. 252.
Knox v. Gye 5 L. R. H. L. 56.
Beckforth v. Wade 17 Vesey 98.
Price v. Phillips, (1894) W. N. 8 Dec. p. 213.
Cunningham v. Foot 3 App. Cas. 974.

The Counsel for Plaintiff admitted that the case was not one on an Express trust upon which the authorities cited by the Counsel for the Defendant alone bore.

He contended that the Plaintiff's case rested upon and was supported by—

Thos. v. Thomas, 25 L. J. Eq. 159.
Pelley v. Bascombe, 33 L. J. Eq. 100.
Wall v. Stanwick, 34 Ch. D. 753.
Hobbs v. Wade, 36 Ch. D. 553.

After hearing the Counsel for Defendant in reply, I pointed out that there was no express trust alleged by Plaintiff, and therefore the authorities on that point had no application; that there was a principle of law that a person entering upon the lands of an infant could be called upon to account to the infant after majority, and that the Statute of Limitation would not be a bar. This principle was not of universal application where the person entering was a stranger and might show some right for his entry—but in the case of relatives it had been adopted. This was to be found in Thomas vs. Thomas, and Pelley vs. Bascombe. In the former where a father had entered upon the land of his infant child during minority he was held to have done so as a bailiff and the Statute of Limitation which was pleaded was held not to apply, and an account from persons representing him decreed.

In the latter case an uncle had entered into possession during his niece's minority and the principle laid down in Thomas vs Thomas was followed, the uncle was declared to have entered

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as a baliff, the Statute of Limitation was decided not to apply and his representatives were required to account. The two other cases of Wall vs. Stanwick and Hobbs vs. Wade were in affirmance of the principle with regard to the entry by a relative. In these two cases no question arose upon the Statute. In Wall vs. Stanwick it was also stated that such a person might be styled a trustee.

Upon those authorities and the statement of claim being so framed as to bring this case within them the motion of the Defendant's Counsel was denied and the Plaintiff allowed to proceed to prove her case.

Before the evidence was entered upon admissions were made by Defendant's Counsel of the facts in the statement of claim in paragraphs 1, 2, 5, 7.

The Plaintiff had therefore to prove the allegations set out in paragraphs 3, 4, and 6, which are shortly :

- (3) That John James Wells was lost at sea in or about the month of October 1866.
- (4) That the said John James Wells at the time of his death was possessed of the land described in the statement of claim.
- (6) That after the death of John James Wells the defendant entered into and took possession of such land.

To show the death of John James Wells it was proved that he was a master mariner sailing in his own vessel between Nassau and New York, that he left New York for Nassau during the latter part of September 1866, that a violent hurricane raged here in October 1866, and that he has never been seen or heard of since.

There is a presumption of law that a person who has not been heard of for seven years is dead, but there is no presumption as to the particular period at which he died within the seven years, that, if necessary, must be distinctly proved. (*Nepean vs. Doe* 2 M. & W. 911 ; *In re Phene's Trusts* 5 L.R. Ch. D. 139).

So far then the death of John James Wells is presumed to have taken place he not having been seen or heard of for a period of thirty odd years, but it is not necessary for me to

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decide that he died at any particular period during this absence.

A large body of evidence was taken in the case. The first two witnesses called proved the issue of grants, and the record of conveyances showing that the land in dispute originally granted to one George Gray afterwards became the property of John Wells, the grandfather of the plaintiff, and father of the Defendant.

It was admitted during the trial that there was no dispute as to the identity of the lands claimed by the Plaintiff and that in possession of the Defendant, that they were one and the same, and that they went by the names of "Grays," and "Dr. Grays."

The remaining witnesses on both sides were called upon the point of possession of John J. Wells at the time of his death and the entry of Defendant after such death. As may be supposed the evidence on these points is very conflicting.

On behalf of the Plaintiff evidence was given to show that the deceased J. J. Wells had expressed his intention about the year 1864 when, as it was proved, his elder brother (Edward), had been absent from the Colony and unheard of for a number of years, to proceed to Long Island to look after the estate left by his father.

A witness was called to prove that shortly after this the Defendant had stated in conversation with or before him, "that his brother John (the deceased J. J. Wells) had come up (meaning Long Island) to take charge of the estate by not hearing from his brother Edward," "That he had come to take charge of the stock," "to take charge of his property"; that he was also present when a conversation took place between a man now dead, who had been a herdsman for Edward Wells, with a brother, in the presence of the Defendant, when the herdsman stated that the Defendant's brother John came up to take charge of the Estate as his brother Edward was not heard of.

This witness stated that at no time did he hear any mention made of land.

Witnesses were called to prove the receipt of stock and produce from this land by John James Wells and by his widow after his death. One of the witnesses swore that they were taken from "Wells" or "Grays" when John James Wells was there. It is denied by the Defendant that his brother ever took any-

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thing from the land. Another witness proved bringing stock from a place he believed to be "Wells's" without saying from whom he received it. The others proved the delivery at the residence of produce by the man Wilson (the herdsman) but there is nothing to show me that the Defendant was a party to the sending, or that it all came from this land.

Evidence was also given of an interview which Defendant had with the grandmother of the Plaintiff when the Plaintiff was about 11 years old, in which it is sworn that the Defendant stated that "if the Plaintiff had been a boy the land would have been hers."

I may say here that the evidence given on the principal points in the Plaintiff's case, was given by persons who were quite young when the circumstances happened to which they deposed.

The Defendant denied the facts set forth in the statement of claim contained in the 3rd, 4th and 6th paragraphs.

He alleged that he had been in possession of this land in his own rights since the year 1856, and several witnesses were called who showed that he had been in possession for many years before the visit of his brother John James Wells in 1864.

He admitted the visit made by his brother in that year, denied that it was for the purpose claimed by the Plaintiff, and alleged that it was one purely of a friendly nature and with the object of visiting his (Defendant's) wife, the Defendant having been married a few months before.

He denied that the land had ever been taken charge of by his brother John, or that he had acknowledged his ownership in any way. He further denied that the conversations sworn to by the witness Watkins had ever taken place; and the interview with the Plaintiff's grandmother.

He alleged that he had continued in his possession of the land since the visit, and he claimed to be the owner of it. He produced witnesses to show his undisturbed possession of this land for many years before the visit of John; and tenants were called who proved that they had always accounted to his uncle or him.

I do not accept the evidence of the Defendant on certain points. I believe that the visit of John James Wells was for some purpose in connection with this land, and not for the

trivial reason stated by the defendant, and I also believe that an interview took place between him and the Plaintiff's grandmother.

But while I believe this I am not satisfied that sufficient evidence has been produced to show that John James Wells did take charge of the Estate and thereby become possessed thereof, and so destroy the possession of the defendant.

Assuming that such had been established I am inclined to the opinion that the remaining in possession by the Defendant, unexplained, would have constituted him a tenant at Will. As such his possession after the expiration of a year, would have been adverse (See 7th Sec. 3 and 4 William 4, c. 27 Statute of Limitation) and the statute commencing to run against John James Wells in his lifetime would have continued to do so after his death and so affected the claim of the Plaintiff.

My decision rests upon the fact that the Plaintiff has not established to my satisfaction the allegations contained in the 4th and 6th paragraphs of her statement of claim, that her father John James Wells died possessed of the lands, and that the Defendant, after her father's death, entered into possession thereof so as to enable me to make the declarations and decrees prayed for.

I therefore dismiss this action.

I make no order giving costs.

Counsel for Plaintiff: *Malcolm.*

Counsel for Defendant: *Rae—Acting Attorney General.*

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[EQUITY SIDE.]

1901

CHARLES TYLDESLEY SANDS *v.* ALONZO EDWIN
GRIFFIN AND ABNER WHITFIELD GRIFFIN.*January.**Account—Disposition of Fertilizer and Crops—Commission.*

Held, that Ship's account was the proper account and not the Rock account—that claim of 5 p.c. on fruit sold by Defendants should not be allowed—Plaintiff to deduct cost of fertilizer before calculation of Defendants' Commission.

This was an action of account brought on the Equity Side of the Supreme Court. The parties are owners of land at Eleuthera which is cultivated with pineapples. Under an agreement between the parties the Defendants cultivate and control this land and render accounts to the Plaintiff annually in August. The accounts rendered in August last of the transactions relating to the disposition of last year's crop proved unsatisfactory to the Plaintiff. As an amicable arrangement could not be arrived at, Mr. Sands resorted to the Court. Involving principally questions of account the action was, at the request and consent of the parties, referred for the report of James William Culmer and Lewis Taylor, Esquires, who were appointed Masters of the Court for the purpose of dealing with the matter in difference. The Plaintiff questioned the accounts which had been rendered in the following particulars:

He claimed that a larger number of pineapples had been cut from the joint cultivations than the Defendants had made return of. In support of this, reliance was placed on what is known as the "Rock Account," between which and the "Ship Account" there was a discrepancy. On the part of the Defendants it was contended that by the Custom of the industry the Ship's Account was the more reliable and was invariably accepted in preference to the Rock Account.

The Plaintiff also disputed a charge of 5 per cent. commission on certain pineapples which had been sold at Eleuthera. His position was that under the agreement this commission was only chargeable on the proceeds of the fruit which was shipped on joint account. The Defendants claimed that the sale of these fruit was a shipment within the meaning of the terms of the agreement. The next point in dispute was the charge of the Commission Merchants in Baltimore. Before the shipping sea-

son, the Plaintiff had informed the Defendants that he would not consent to a payment of more than 5 per cent. for disposing of the fruit. The Defendants consigned to a Commission House which charged 7 per cent., and they claimed that, as under the agreement they controlled the shipping arrangements, they had a right to pay what commission they pleased.

Another disputed point was the meaning of the words "Nett proceeds" used in the agreement. Under this document the Defendants were, for their management of the lands, to receive 10 per cent. of the nett proceeds received by the Plaintiff. They contended that this percentage should be calculated before the cost of the fertilizer used during the season had been deducted.

The Plaintiff claimed the contrary.

The case occupied four days in hearing. Many witnesses were examined and much correspondence put in evidence. On the 5th of January the masters filed their written report by which they determined the matters in dispute as follows:—

The Ship's account of the number of pineapples shipped was in accordance with custom, accepted in preference to the Rock Account.

The Defendants' claim of 5 per cent. on the fruit sold at Eleuthera was disallowed. The commission for selling in Baltimore was reduced to 5 per cent.

and

The Plaintiff was allowed to deduct the cost of fertilizer before the Defendants' commission of 10 per cent. was calculated.

On Monday last judgment was given for the Plaintiff for £378 4s. 10d. and costs.

Counsel for Plaintiff:—*Rees Davies—Acting Attorney General—and Malcolm.*

Counsel for Defendants:—*Matthews and Clutsam.*

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IN CHAMBERS.
ORIGINATING SUMMONS.

IN THE MATTER OF THE ESTATES OF GEORGE W. FRENCH, DECEASED, AND LOUISA ANN FRENCH, DECEASED.

H. WEIBKE AND COMPANY, *v.* NATHANIEL FRENCH,
AS ADMINISTRATOR OF THE SAID ESTATES.

*Policy of Insurance—Married Woman—Death of, intestate—Devolution
—Title of husband—Reduction into Possession—Married Women's
Property Act, 1882 (Imperial Act 45 and 46 Vict., c. 75)
Bahama Act 47 Vict. c. 22, s. 11.*

1903

March.

A, a married woman, in whose favour a policy of insurance had been effected by her husband, dies intestate. Her husband dies shortly after. The defendant obtains letters of administration on both estates. The plaintiffs obtain judgment against the defendant as administrator of the deceased husband. The defendant is in possession of the amount due on the policy referred to.

Held, that on the death of A, intestate, the husband was absolutely entitled in right of his wife to the policy moneys.

Held also, that the monies received by the defendant under the policy, as administrator of the estate of A and her husbands, was to be applied for the benefit of the creditors of the husband.

SIR O. D. MALCOLM, C. J. On the 10th day of May 1895, George W. French effected an insurance on his life with the North American Life Assurance Company in favour of his wife Louisa Ann French, the company promising to pay to her, her executors, administrators, or assigns the sum of \$1000 upon the death of her husband.

Louisa Ann French died on the 2nd of June 1898; and George W. French on the 16th of January 1902.

No disposition was made of the policy or the monies secured by it by the wife in her lifetime, and she died intestate.

The Defendant on the 12th of March, 1902 obtained letters of administration on the estates of the deceased husband and wife.

The Plaintiffs obtained a judgment against the Defendant as administrator of George W. French on the 18th of April 1902 for the sum of £212. 15. 8. and £7. 7. 4. costs.

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The Assurance Co. paid to the Defendant on his production of letters of administration on the estate of George W. French and his wife the amount due on the policy referred to which sum now remains in his possession.

On the 17th of February last the summons in this matter was taken out on behalf of the Plaintiffs calling upon the Defendant to appear before me on the 27th February, in order to have determined the question whether the monies so received by him were distributable among the creditors of the deceased George W. French.

On the last named day the parties appeared before me by Counsel.

The Attorney General for Plaintiffs.

Mr. Clutsam for Defendants.

In his argument for the Plaintiffs the Attorney General first called my attention to the 11th Sec. of the Married Women's Property Act 1884, quoting therefrom the following:

"A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, . . . shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his . . . debts;" and admitting that the wife would have been entitled to the monies had she survived her husband, or her legatees had she left a will, urged that as she had predeceased him, intestate, the benefit of the policy enured to her estate; that if the husband had been alive he would have been entitled to all of her estate, not disposed of by will, and that he being dead his rights go to his estate—that the Defendant receiving the Policy monies as Administrator of Mrs. French became a trustee of the amount on behalf of himself, as the Administrator of George W. French.

In support of his position he cited the following authorities:

1.—In *re-Lambert*, 39 C.D. 627. In this case, Agnes Lambert a married woman died leaving her husband and three infant

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children surviving her. Under the will of her mother she had a general power of appointment over certain trust funds, and by her will she exercised this power in favour of her husband and children, but made no further disposition of any property belonging to her. At the time of her death she was entitled to certain separate estate. A summons was taken out by her husband to settle the question as to who were entitled to such part of the personal estate of the said Agnes Lambert as had not been beneficially disposed of by her will, and in what shares and proportions.

The Court decided that the husband was entitled, that the executors of her will became trustees of it for him, and consequently that he, and not the next of kin of the testatrix was entitled to it.

In delivering his judgment Stirling J. said "The law as to 'the right of a husband surviving his wife to her *choses in action*' has long been settled. Such *choses in action* could only be re-covered by the legal personal representatives of the wife but 'they were not in any way subject to the provisions of the Statute of Distribution (22 and 23 Car. 2, C. 10) it being expressly provided by Sec. 25 of the Statute of Frauds (29 Car. 2, c. 3.) that 'the Statute of Distributions shall not extend to the estates of *feme covert*s that shall die intestate, but that their husband may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said Act."

2.—Drew v. Long, 22 L. J. Ch. 717. According to the facts in this case it appeared that one Greenhill bequeathed the sum of £900 to trustees, to pay the interest to his wife for life, and after her decease to divide the principal equally between his 3 daughters—one of whom was Eliza Long the wife of Charles Long, that Eliza Long died in 1831, leaving her mother the tenant for life and her husband surviving her; that the husband became bankrupt in 1839, and died in 1844 without obtaining his certificate. The widow of the testator died in 1850, after which the defendant Joseph Long took out administration to Charles Long and his wife, and thereupon became possessed of the £300, being the third part of the £900 given by the testator Greenhill equally between his 3 daughters upon the decease of his widow.

The bill was filed, by the assignees of the bankrupt C. Long, against Joseph Long, the administrator of C. Long and E. Long his wife, praying that they might be declared entitled

to the said £300, and the interest which had accrued since the decease of the tenant for life.

The defendant Joseph Long, in refusing to give up the amount, alleged that as C. Long had died before the decease of the tenant for life, the £300 which was a chose in action of the wife had never been reduced into possession, and the assignees could not therefore be entitled to it. He also took objection to the proceedings in bankruptcy which, however, is of no importance on the point before me.

V. C. Kindersley in giving judgment as set out in the head note to the case held that the husband was absolutely entitled in right of his wife to the reversionary interest expectant upon the death of the tenant for life, although that interest was not reduced into possession; and that the assignees had the same right to receive the money as the husband would have had. In his judgment, His Lordship used the following language:

"The defendant insisted that the plaintiffs were not entitled, even as assignees, because the husband never reduced the reversionary interest into possession and could not have done so. Now, for the reasons which I have mentioned, I do not think it was necessary that the husband should have reduced the reversionary interest into possession provided the wife predeceased him, as her death vested all her personalty, her reversionary choses in action, and all her property of a like nature in her husband. The reason why it was impossible for the husband to become entitled to it immediately was, that it was a reversionary chose in action; and unless both had survived the tenant for life, and Mrs. Long had predeceased her husband, he could not have reduced it into possession.

"My opinion, therefore, is that there being no reduction into possession did not prevent the beneficial interest from surviving to the husband or being an absolutely reversionary interest in his assignees."

3.—In the goods of M. A. Harding 2 L. R. Probate, p. 394 in which it appeared that the deceased being entitled to a legacy, on the death of another person, married and died in the lifetime of her husband, who also died before the legacy became payable, and without having taken out administration to his wife. It was held, that the legacy formed part of the estate of the husband, and that administration to the deceased husband must be taken out in the first instance.

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The following remarks are contained in the judgment: "whatever be the nature of her personal estate, if the wife dies "first, it belongs to the husband. If she survives him, her choses "in action belong to her or her next of kin, and she may dispose "of them by will, unless the husband by force of his marital "rights has reduced them into possession in his lifetime. There "is no such principle of law where the husband survives her."

This case was decided before the passing of the Imperial Married Women's property Act 1882 (in force here by our Act of 1884) and under which a wife can dispose of her property by will made during coverture.

The object of citing this case, was to show that in order to claim the property of the deceased wife, it is necessary that administration should be taken out to the wife, as well as to the husband; which has been done in the case before me.

Upon the point that a husband is entitled to his deceased wife's personalty—where not disposed of by her—the following extract from the judgment of Lord Westbury in the case of *Partington vs. the Attorney General* 4 L. R. Scotch and Irish App. P. 119 was read by the Attorney General:

"According to English law, if a married woman becomes "entitled to receive a sum of money, the husband becomes entitled to it *jure mariti*; but if the wife dies before the husband has "received it, the husband, although the beneficial right remains "the same, must in order to receive the money take out administration to his wife; and if he dies without having done so, "it is necessary that letters of administration should be taken out "to the wife's estate (for such is still the legal character of the "money,) but the wife's administrator is only a trustee for the "representative of the husband."

This case was decided in 1869, and the principles there laid down would be subject to the provisions of the Married Women's Property Act in the same manner as I have mentioned in the preceding case.

The authorities so cited, go to show that the personal property of a wife predeceasing her husband, intestate, belongs to him, and he has the right to receive it upon taking out administration of her estate, and, on his failing to do so, his representatives after his death stand in his position, and are entitled to claim and receive such property, and even if he had not reduced it into possession in his lifetime.

I have now to deal with the points raised by the Counsel for the defendant, and will take them *seriatim* :

1. The policy never formed, or could have formed, part of George W. French's estate as it was not in the possession of the wife at the time of her death, but was payable on a certain contingency, that is, the death of her husband.

This is met and answered by the authorities cited by the Attorney General, and commented upon by me.

2. That the policy of insurance having been effected under Sec. 11 of the Married Women's Property Act, by the husband for the benefit of his wife, it created a trust, which trust was not consummated until after the death of the husband.

This position is correct, but the trust so created was for the benefit of the wife alone, and had she survived her husband she would have been entitled to receive the money under the policy free from the claims of her husband's creditors ; or, if she had left a will, her legatees would have stood in her place and have been entitled to the money, but predeceasing her husband, *intestate*, the principles laid down in the cases above cited apply, and the proceeds of the policy became a part of his estate, and her administrator receiving them does so in trust for the husband's administrator.

3. That the amount payable on the policy was not in existence, and never became a claim until after the death of George W. French.

This is undoubted, but for the reasons given in the authorities cited requires no comment from me.

4. That George W. French not having reduced his wife's choses in action into possession they remained part of her personal estate, and therefore the administrator of Mrs. French's estate holds the amount of the policy in trust for the children of George W. French and his wife, as next of kin, and that the policy was entered into for the advancement of wife and children, although the latter are not mentioned.

The answer to this is, that, as the policy in question or the right to the proceeds under it, did not become a chose in action of the wife until the death of the husband, it was impossible for him to reduce it into possession during his lifetime. That even supposing it had been capable of being reduced into possession during his lifetime, his omission to do so would not affect the

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right of his Administrator to the money, according to the law laid down by V. C. Kindersley in *Drew v. Long*.

As to the Administrator holding the money in trust for the children, as next of kin, I would observe that the policy was taken out for the benefit of the wife alone, and not for the wife and children, as it might have been under the 11th Sec. of the Married Women's Property Act, that the trust thereby created was for the benefit of the wife only, and the proceeds received by the Administrator of Mrs. French's estate are held in trust for the Administrator of George W. French's estate, as is shown by the authorities.

Counsel for the Defendant cited :

1st. *Holt v. Everall*, 2 Ch. D. 206, which was a case where a husband effected an insurance on his life for the benefit of the survivor of himself and his wife ; the premiums were paid from the separate estate of the wife. He became embarrassed and went into liquidation under the Bankruptcy Laws—He then died.

The question for decision turned upon the point whether the policies were a settlement, which, under the Bankruptcy Laws, could be set aside as being void in fraud of his creditors. The Court (Appellate Side), decided in favour of the wife.

There is nothing in the case touching the principles of law dealt with in the matter before me, and it cannot be applied in any way.

2. *In re Adams' Policy Trust*, 23 Ch. D. 525.

This case does not help the Defendant, but rather supports the position of the Plaintiffs. A husband effected a policy *for the benefit of his wife and children* under the Married Women's Property Act 1870, (the provisions of which are in force here by our Act of 1884.)

His wife and one child predeceased him. He died insolvent. Application was made to the Court, on behalf of the children, for the appointment of a trustee of the policy monies, and for a declaration of the rights and interests of the petitioners. "Chitty" J., in dealing with the application, after commenting upon the cases submitted to him, and referring to what in his opinion were the rights of the wife and children, concluded his judgment with these words :

"It appears to me that this being an application under the Act of 1870, I have no jurisdiction to do more than appoint

“a trustee. If the wife did take an interest in accordance with “V. C. Malins’ view, the result would in the present case be “disastrous, because she would then have taken a share as under an intestacy, and having died in the lifetime of her husband he would have been entitled to the representation of her estate; and accordingly her shares would go, not to the children, but to the husband’s creditors.”

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Though this expression of opinion was not necessary to the decision of the matter before him, it affirms the principle set up by the creditors of the late George W. French, and the correctness of the position put forward on their behalf.

With respect to the reference to Story’s Equity Jurisprudence as to a wife’s separate estate, and a wife’s equity to a settlement, these are points that do not arise in a matter of the kind now under discussion.

A wife’s separate estate, undisposed of by her, becomes on her death the husband’s property, the same as any other. The Judgment of Sterling J., and the authorities cited by him in re-Lambert’s Estate at p 633, establish this.

These other authorities mentioned by Counsel have no bearing upon the points in issue.

The result in this case might have been avoided if the policy had been taken out for the benefit of the wife and children; or, failing that, if the wife had disposed of it by will or otherwise; or, even after her death, if the insured, the Company consenting, had surrendered the policy and effected another for the benefit of the children.

I answer the question submitted in the affirmative, and declare that the monies received under the policy are distributable among the creditors of the deceased George W. French, and that as the Administrator of Louisa Ann French is also the administrator of the estate of George W. French, he holds the monies for the benefit of the creditors of the said George W. French, after deducting his proper charges and expenses thereon.

Counsel for Plaintiffs :—*Bertram—Attorney General.*

Counsel for Defendant :—*Clutsam.*

EQUITY SIDE.

THOMAS E. D. BRACE, CLERK OF THE BOARD OF WORKS
FOR THE ISLAND OF NEW PROVIDENCE vs. FRANCIS M.
MENENDEZ.

1903

July

*Abutments—Extension of into Harbour—Restriction of Buildings there-
on—Powers of Board of Works—Certificate of Civil Engineer—
Property acquired by—Mandatory Injunction—"The Abut-
ment Acts 1859—1901."*

A, the owner of an abutment between Bay Street and the Harbour—half of the Southern frontage of which being already built upon—commences to erect a building on the remaining portion of such frontage.

The Board of Works holding that the Abutment Acts prevented this further erection, instituted an action against the defendant claiming a mandatory injunction for the removal of such building.

A contended that the said property was freehold and was not affected by the Abutment Acts.

Held, that the frontage on Bay Street in so far as it extends to the northern wall of the building now standing upon the abutment was freehold property and was not affected by the Abutment Acts.

Held further, that the remainder of the Abutment to the Harbour was not freehold property and was subject to the provisions of the said Acts.

SIR O. D. MALCOLM, C. J. : The Board of Works for the Island of New Providence, acting under statutory authority, have instituted these proceedings, asking for an injunction to compel the Defendant to take down and remove a building which he has commenced to erect on the Southern frontage of certain bay lot premises situated in the city of Nassau.

The proceedings are based upon the Act of Assembly 27 Vic. c. 5, passed in 1864, and it is claimed that the act of the Defendant is a violation of the 4th section of the statute, which prohibits the erection of any building on such premises without the sanction of the Board.

The building commenced by the Defendant and which it is sought to have removed is on the Eastern half of the Southern frontage of the bay lot premises. There is already standing on

the Western half of the Southern frontage a building erected by a former owner of the premises.

To understand these proceedings clearly it is necessary to give a short history of the abutment premises lying on the northern side of Bay Street, which, so far as the evidence in this case goes, commenced in the year 1795.

In that year an Act was passed by the Legislature entitled "An Act for improving or embellishing the Strand or Bay of the Town of Nassau, in the Island of New Providence," and it can be gathered from it that at that time the proprietors of the various lots on the South side of Bay Street, while holding their respective properties in fee, had no interest at all in the portions of the strand on the north side of Bay street lying immediately in front of their said properties.

By a plan, dated 1788, of that part of Bay Street along which the then town of Nassau stood the strand to the north of that street is shown in an irregular frontage on the Harbour, thus indicating that at that period there were no abutments or quays in existence, and this is plainly demonstrated by the words used in the Act of 1795.

In its preamble it is stated,

"that it would tend much to the improvement and embellishing of the strand or bay of the town of Nassau and to the convenience as well of the merchants and other inhabitants thereof as of persons trading thereto if the margin of the Harbour or vacant space lying between Bay street and low water mark were properly faced with strong and sufficient walls and abutments."

Authority was given by the Act to the proprietors of the several lots, messuages, and tenements situate on the bay or strand, within certain named limits, to fill up the vacant spaces of ground lying in front of their respective lots &c. &c. between Bay-street and low water mark, and to erect quays thereon and to extend the same to low water mark.

Provision was made on the completion of the quays for the granting of certificates by the Commissioners named in the Act as to such completion these certificates upon being registered in the register of Deeds made each quay an appurtenance to the lot in front of which it lay.

The Act then declared that every proprietor who obtained and registered a certificate should forever thereafter hold,

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use, occupy, and enjoy the said quay and piece of ground mentioned therein, and that the same should forever thereafter remain, and continue to be, and to all intents and purposes, be considered to be an appurtenance to the lot messuage and tenement in front of which it was situated.

This Act also restricted the right granted to such proprietors by declaring it unlawful to erect any house &c., &c. other than gates upon the quay.

The Act of 1795 remained in force until 1859 when it was repealed by 22 Vic. c. 25 which, besides authorising the extension of existing abutments by the Government out of a loan to be raised for the purpose and from a tax imposed upon wrecked goods brought into the Colony, embraced a variety of other works and it gave the proprietors of the existing quays the privilege of obtaining the fee simple of the abutment so extended upon payment of the cost of the extension, and permitted such proprietors after obtaining the fee simple to erect buildings of uniform height and dimensions on a moiety of the Southern frontage of such quay or abutment.

The wording of this Act shows that abutments must have been extended under the Act of 1795, and it was stated by the Attorney General that although several certificates under the Act had been found on record, relating to certain extended abutments, which were not given in evidence, yet no such certificate could be discovered referring to the strand opposite the Western moiety of Lot No. 54, which is the abutment lot now under discussion in this case.

That an abutment opposite this lot, or a portion of it, was extended before 1837 is shown by one of the deeds conveying a part of the South side property to Palacios; and the grant from the Crown to him in 1837 of such abutment, which are referred to later on.

These extensions explain the wording of the Act of 1859, as otherwise the term "strand" would have been used therein instead of "the present quays or abutments."

The Act of 1859, while authorizing the extension of the various abutments, and permitting the proprietors on the South side of Bay Street to obtain them on payment of the cost, reserved a frontage on the Harbour of 40 feet as public property.

No evidence was given whether any abutment was extended under the Act of 1859. It was repealed in 1864 by 27 Vic. c.

5, and judging from the radical change made by the last-named Act, in the mode of extension of these abutments, it may be inferred that the schemes of 1859 were found to be too elaborate and expensive, and that it was deemed wiser to allow the extensions to be carried out by private enterprise.

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Before dealing further with 27 Vic. c. 5. I will trace the title of Palacios to the lot on the Southern side of Bay Street and the abutment in front, and the manner in which the latter came into the possession of Mr. Clough who is represented in this case by Menendez the Defendant.

In 1791 the Crown granted the western part of Lot No. 54 in the City of Nassau to Ebenezer Lowe and George Gray. This is the lot which is immediately opposite to the abutment now in question, and its northern boundary is given as the Bay.

Lowe and Gray in the same year conveyed it to one George Johnson, who, in 1837, settled it upon his family, but before this, in November, 1836, one George Smith conveyed a portion of the lot to Palacios who, later on, obtained a conveyance from S. Dillet and others dated 13th June 1837; and others from Mr. W. Smith and certain members of the Johnson family dated 26th May 1838.

Prior to the last two deeds the Crown granted to Palacios (on 8th Aug. 1837) the abutment now in question.

On the 26th May 1838, Palacios held these two properties in fee.

On the 13th December 1880, he being dead, his trustees sold the abutment to E. Y. Webb who in Dec. 1891 conveyed to Clough.

While Palacios was the owner of the land on both sides of Bay Street the Board of Works treated with him for the purchase of a part of the abutment lot to enable them to widen Bay St. under the authority of the 10th Section of the Act of 1864, and while no deed has been produced for the conveyance of the part so acquired, the Civil Engineer in his evidence put the quantity as 33 ft. 6 in. on the Eastern Side of the lot and 35 ft. 4 in. on the Western side.

Taking these measurements as correct and the original measurement of the abutment according to the plan annexed to the Crown grant being 71 feet on the Eastern and Western sides respectively, there remained to Palacios 37 ft. 6 in. on his

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Eastern boundary and 35 ft. 8 in. on his Western, and this is the portion he must have referred to in his letter to the Board (22 June 1864) as the "remnant" of his lot.

In that letter he asks the sanction of the Board to the erection of a building "on the remnant of the southern frontage of "my abutment," and submitted a plan of the proposed building.

The plan is not forthcoming and the character of the building can only be gathered from the reply of the Board dated 29th June 1864, which sanctions the erection of a building of stone

20 feet high,

20 feet wide,

30 feet long,

with a brick roof which was subsequently changed to a shingled one.

By a plan prepared in the Civil Engineer's department and given in evidence (E 1) these dimensions seem not to have been followed as the building in question appears thereon as being.

21 ft. 4 in. wide

and

37 ft. 7 in. long

the latter being about the entire area left on the Eastern side.

There must have been an extension of some kind beyond the building, temporary or otherwise, for we find that in 1879 and 1880 a correspondence took place between the Board of Works and Palacios and his daughter Mrs. Rookes, acting for him, resulting in the removal of a small building to the north of the original building, and which it was alleged interfered with the extension of Charlotte St. into the Harbour.

Palacios does not appear to have taken any action towards extending his abutment, and the only further step on his part was making an application to the Board for permission to place a staircase alongside of his building. The Board deeming it beyond their powers to sanction this so notified Palacios; and he, persisting in such erection, they threatened him with an action, when he, with the owner of another abutment, petitioned the Legislature and an Act was passed legalizing such erections.

It was set out in this petition that the abutment had been extended under the Act of 1864 (27 Vic. c. 5) and my attention

was called to it by counsel for the Plaintiff, to show that Palacios had adopted the Act, which was one of the points urged when submitting that Palacios and his successors in title were estopped from saying otherwise.

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Why it was so alleged it is difficult at this time to understand, that it was a misstatement so far as Palacios was concerned is clear, for the evidence given in the case shows that the extension was not commenced before 1882 nor finished until 1891.

Matters remained in this state until 1880, when Palacios having died, the abutment was sold by the trustees of his estate to Webb. In the deed to Webb in describing the property the Eastern and Western boundaries are given respectively as 71 feet, a manifest error, unless there had been a prior extension, for the actual premises at that time were 37 ft. 7 in. on the East and 35 ft. 8 in. on the West as already mentioned.

The grant from the Crown gave 71 feet as the Eastern and Western boundaries and they were evidently copied therefrom in Webb's deed without any thought being given to the portions taken off for Bay Street.

Webb filled in and extended the abutment and the certificate directed by Sec. 2 of the Act of 1864 must have been issued to him though there is nothing to show it beyond the document subsequently delivered to Menendez in 1897, under the circumstances here following.

In 1891 the premises were bought by Clough who resides in England.

In 1897, Clough, through Menendez, commenced to erect a building on the extended part of the abutment. The Board of Works objected to his doing so until he obtained and recorded the certificate required by the Act of 1864, and their sanction.

Menendez protested and claimed that the property was freehold, that the Act did not apply and refused to comply with the Board's demand. A lengthy correspondence ensued and after communicating with Clough, Menendez applied for and received the document alluded to above and having recorded it in the office of the Registrar of Records he was permitted to complete his building.

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The form of this document is as follows :

Civil Engineer's Office,

Nassau, 27 July, 1891.

I hereby certify that the abutment to the north of Bay Street laying between Mr. Hall's property and the public road next Mr. Darling's property has been property built out to the northern line of extension in accordance with the provisions of Act of Assembly 27 Vic. c. 5 and 52 Vic. c. 6.

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Witness,

J. E. Aranha.

In 1902 Menendez commenced the erection of another building this time on the Southern frontage of the original abutment on the part after the portion for widening Bay St. had been taken away.

The Board again took exception to this and a correspondence followed between them and Menendez, Menendez repeated the claim put forward before that the property was freehold and not subject to the Act of 1864, and declined to remove the building, whereupon the Board instituted these proceedings.

The statement of claim was filed on the 10th of September last and contains five paragraphs which may be set out shortly as follows:—

1. That the Plaintiff is Clerk of the Board of Works and sues in that capacity.

2. That Defendant about May of 1902 commenced to erect a building on the Eastern part of the Southern frontage of a bay lot situated at the corner of Charlotte and Bay Street in this City without having obtained the sanction of the Board as required by the 4th section of the Act of Assembly 27 Vic. c. 5.

3. That the bay lot is one extended under the provisions of the Act.

4. Prior to the commencement of the building by Defendant there had been erected on the western half of the Southern frontage of the bay lot, a building which still stands thereon.

5. That the erection of the building by Defendant is contrary to Sec. 4 of 27 Vic. c. 5. and concludes by claiming a

mandatory injunction to compel the Defendant to take down the building so commenced by him.

The statement of defence was filed on the 21st Oct. 1902 and sets up.

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1. That it was not necessary for the sanction of the Board of Works to be obtained before erecting the building as set out in paragraph 2 of the statement of claim.

2. That no part of the Act of Assembly 27 Vic. c. 5 applies to or affects the bay lot in question and that it could not have been extended under that Act.

3. The erection of the building was not contrary to Sec. 4 of the Act or any other provision of it

4. Sets out that the original bay lot was granted to one Palacios by the crown in 1837; that his trustees conveyed it to one Webb in 1880 with a similar description to that contained in the grant; and that in 1891 Webb conveyed it with the original description, but with an extension on the Eastern and Western boundaries to one Clough.

5. That on a comparison of the descriptions contained in the three deeds with the lot referred to in the Act of Assembly it becomes obvious that the said Act does not apply to the lot in question.

6. On the passing of the Act 27 Vic. c. 5, Palacios possessed the freehold in the lot in question and that nothing done under the Act could make it a freehold or take away the inherent rights attaching to such freehold.

7. Alleges that erection of building by Defendant was as agent of Clough.

8. That Defendant would object that the Court has no power under the Act or otherwise to grant an injunction or any relief to the Board of Works.

A reply was filed to this defence on the 8th Nov. 1902 which, after taking issue upon the 1st, 2nd, 3rd, and 8th paragraphs, proceeds to allege:

1st. That the lot of land alleged to have been granted by the Crown to Palacios was an extension under 36 Geo. III., c. 3 of a vacant space of ground in front of the Western part of Lot No. 54 in the plan of Nassau and became by virtue of such

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enactment an appurtenance of the said Western half of Lot No. 54-

2nd. That the Western part of Lot No. 54 was granted by the Crown in 1791 to Ebenezer Lowe and George Gray and consequently when granted to Palacios the fee simple did not vest in the Crown, and that prior to Palacios' trustees conveying to Webb, the Board of Works in 1864 purchased a part of it to widen Bay Street.

3. That the subsequent extension of the residue of the lot was and could only be effected under 27 Vic. c. 5 and the amending Act 52 Vic. c. 20 and that the party making such extension having taken the benefits and advantages of the enactments he and his grantees are bound by the restrictions imposed, and that the Defendant should be estopped from asserting the alleged grant from the Crown.

4. That Clough was not joined at Defendant's request. (Nothing turns upon this point as the Act applies to any person erecting a building.)

This reply was afterwards amended in its 3rd paragraph by the inclusion of words to the effect that on divers occasions the proprietor or tenant extending by their conduct admitted that the said enactments applied to the lot in question.

Particulars of the occasions referred to were furnished to the Defendant and filed in the registry, and embodied correspondence of Palacios, and Menendez, with the Board of Works, and other documents which are dealt with hereafter. •

To the amended reply the Defendant filed by leave a special rejoinder.

This pleading contains two paragraphs.

The 1st is a denial that the lot granted to Palacios was an extension under 36 Geo. III., c. 3 of the vacant space of ground in front of the Western part of Lot No. 54.

A denial that the lot granted by the Crown became by virtue of such enactment an appurtenance of the said Western part of lot No. 54.

A statement that Defendant does not admit the grant of the Western part of Lot No. 54 to Lowe and Gray.

It then adopts the following alternative ;

If the land granted to Palacios was an extension under

36 Geo. III., c. 3 and became an appurtenance to the Western part of lot No. 54,

and

if the said Western part was granted to Lowe and Gray that the Crown was not debarred from granting the lot in question to Palacios—the Crown not being expressly mentioned in that Act.

and

That the Board having purchased a part of the lot from Palacios in 1864 should be estopped from asserting that Palacios was not seized in fee simple under the grant of 1837,

and again

That Defendant has become entitled to an estate in fee simple in possession to the lot under 40 Vic. c. 2 and 47 Vic. c. 2.

2nd. That the extension of the lot into the Harbour was not and could not be effected under the provisions of the Acts of Assembly. (27 Vic. c. 5 and 52 Vic. c. 20.)

and

neither the proprietor nor tenant by whom extension made (if any) did on divers occasions, or at all, by his conduct admit that the enactments applied

and

that none of the benefits or advantages of the enactments could be or were taken by the proprietor or tenant by whom extension (if any) was made and consequently neither the proprietor nor his grantees was or are bound to accept the restrictions imposed by the enactments, nor should the Defendant be estopped from asserting the grant in fee simple from the Crown.

A Sur-rejoinder taking issue upon the rejoinder completed the pleadings.

Proof of the various issues raised by these pleadings devolving upon the Plaintiff were sustained by him with one exception, that is, the extension of the strand under the Act of 1795.

On the conclusion of the evidence for the Plaintiff the Attorney General laid down certain propositions which he con-

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tended governed the case and entitled the Plaintiff to the relief claimed.

They may be put shortly as follows :—

1. That by the earlier Acts—which would mean the 36 Geo. III, c. 3, and those in amendment of it—the Crown was precluded from dealing with the strand.

5. That on a comparison of the descriptions contained in the three deeds with the lot referred to in the Act of Assembly it becomes obvious that the said Act does not apply to the lot in question.

6. On the passing of the Act 27 Vic. c. 5, Palacios possessed the freehold in the lot in question and that nothing done under the Act could make it a freehold or take away the inherent rights attaching to such freehold.

2. That the reference in Geo. Smith's deed to an abutment [and which I refer to later on] shows that the Act had been followed and the strand made an appurtenance, the omission of any reference to an abutment in the deeds from Dillet and others not being conclusive either way.

3. Assuming Act (of 1795) not complied with and Palacios got a valid grant from the Crown, the Act of 1864, (27 Vic. c. 5) was applicable to him :

(a) as he was a proprietor of a lot of land on Bay St. within the 1st Sec. of 27 Vic., c. 5.

(b) his abutment was lying opposite in the terms of that Section :

(c) If Palacios adopted the Act he was bound by its restrictions, and he and his successors in title was and are precluded from setting up any title against those restrictions.

or

in the alternative.

4. On the true construction of 27 Vic. c. 5 having regard to the words and objects it can only be applied as a whole, and cannot be said to apply to the extension and not to the abutments itself.

5. If Palacios did not adopt the Act of 1864, that Act and the one of 1889 (52 Vic. c. 20) were applicable to Webb as a

person possessed of an abutment included in the Act of 1864.

and

that Webb having adopted those Acts would be precluded from setting up any title inconsistent with them and if he was precluded his successors in title would also be precluded.

and again

alternatively

6 Apart from estoppel the Acts of 1864 or 1889 can only be applied as a whole and it is not possible to say that they apply to the extensions and not to the abutments themselves.

7. That Defendant is estopped from saying that the two Acts do not apply to the property in question.

and

Lastly If the construction of the Acts may apply to the extension of the abutments and not to the abutment itself, then it having been proved that part of the building being erected is on the extension the Plaintiff is entitled to an injunction for the removal of that part.

On behalf of the Defendant his Counsel took up the positions: that the Act of 1795 did not bind the Crown; that the grant made in 1837 to Palacios by the Crown vested in him the fee simple in the abutment; and that although the Act 27 Vic. c. 5 conferred freehold rights on the proprietors of lots on the South side of Bay Street, of which Palacios was then one, it did not apply to him and could not confer upon him rights which he already possessed, or destroy or diminish them; and that the Acts ought and could only affect those proprietors who had no freehold rights, and who, or whose predecessors in title, had complied with the Act of 1795 by extending the strand opposite to their lots which would make such extensions appurtenances to such lots.

The Defendant also contended that the Acts of Palacios in asking for sanction to build and to erect a staircase, which were urged as an adoption by him of the Act of 1864 could not be considered in the nature of an estoppel, as, at the time of the application to build, and to erect a staircase, the abutment had not been extended, the provisions of the 2nd. Sec. of the Act of 1864 had not come into force so as to authorize the Board in the

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first instance to sanction such erection, and that such sanction was without authority, *ultra vires*, and could not effect any purpose under the statute.

That in the second instance, although an Act of Assembly had authorized the erection of staircases, such authority was general, and in the case of Palacios only an affirmance of his right under his grant, and it was directed to be done with the sanction of the Board; that no evidence was given that Palacios had applied for and obtained that sanction and that it ought to be inferred in the case of Palacios, who had already commenced the erection of his staircase, that such erection was in his right as a freeholder and not under the Act; and in addition to which the acts of Palacios so relied on, even assuming them to be of any validity, being done in ignorance of his rights as a freeholder, according to the authorities, it was competent for the Defendant to rely upon such ignorance to rebut the doctrine—

Dealing with the acts of Defendant in obtaining and recording a certificate of extension under 27 Vic. c. 5. Counsel urged that the recording of such by Defendant could not bring the abutment and extension within that Act, as it was issued under 52 Vic. c. 20 which required it to be recorded by the party making the extension, who, as shown by the evidence, was Webb and not Defendant.

From the arguments put forward and the evidence submitted the points which appear to me to arise in this case for the settlement of the matters in dispute are the following:

1st Was the Crown precluded by 36 Geo. III., c. 3, from granting this abutment to Palacios?

2nd If not, what effect has the Act 27 Vic. c. 5 upon the grant? Does it destroy the freehold vested thereby, and create another with certain restrictions; or does such freehold remain unaffected with its inherent rights still attaching?

3rd Whether the Acts of 1864 and 1889 must be construed so as to apply to the abutment and extension as a whole, or be directed partly to the abutment and partly to the extension.

4. Accepting the Crown grant in its integrity, untouched by the 27 Vic. c. 5, are the acts of Palacios, Webb, and Menendez given in evidence, of such a character as to estop the Defendant from claiming any rights which flow from the Crown grant

or from denying that the Acts of Assembly do not apply to the abutment?

As to the first point :—

Beyond the conveyance from George Smith there is nothing to show that an extension took place under the Act of 1795. He conveyed 15 ft. 9 in. of the lot on the South side of Bay Street and added to the description of the land the words "also the right to the abutment fronting the said piece or parcel of land now conveyed as aforesaid together with the abutment 'hereunto subjoined.'" The abutment is not shown in the book in which the conveyance is recorded but appears in another book of records together with a receipt from Smith to Palacios for the consideration money, and a renunciation of Dower from Smith's wife.

There is a footnote to Smith's deed which reads as follows :

"N.B. It is distinctly understood between the said George Smith and the said Cipriano Palacios that it is only the right to the occupancy of the abutment that is now conveyed."

No certificate is forthcoming as to this abutment ; Smith's deed is confined to 15 ft. 9 in. of it ; the deeds from Dillet and Smith of the remainder of the lot on the South side make no reference to an abutment, yet the Crown grant plan gives 43 feet on the Harbour ; where do the remaining 27 ft. 3 in. so granted come from ? It is impossible with the evidence before the Court to answer this satisfactorily. There must have been some doubt as to Smith's right to deal with this abutment and the Crown has evidently stepped in and set them at rest by its grant. I cannot, with the facts submitted, go behind the grant of the Crown, and do not consider that the Crown was precluded from making the grant.

The next question is, the Crown not being precluded, what effect has the Act of 1864 upon the grant ? The admission on the part of the Plaintiff, during the trial, that Palacios, until extension had a right to build all over the abutment is an answer to this, but apart from such admission, in which I concur, I should have arrived at the conclusion that I do, that the Act did not destroy limit or abridge the rights enjoyed under the grant.

But, says the Plaintiff, as I understand the arguments, admitting the rights of Palacios to deal with the abutment as he

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pleased before its extension, so soon as that took place the Act came into operation and the freehold rights under the grant were destroyed and others created with restrictions, which bind those owning the abutment who cannot enjoy the original rights which must be narrowed in the manner prescribed by the 4th section.

No authority was cited for this and I have not been able to discover any.

I have looked at the Act to see if there are any words which support this position, for without them I cannot construe it to mean that an abutment held in fee simple independently of the Act should be subordinated to its provisions, and that upon an extension taking place the rights of such a freehold owner should be controlled in the manner urged. I have found nothing in the Act to warrant my doing so.

The probability is that when the Act was passed, the grant to Palacios was lost sight of, otherwise it would not have been left to be implied, but positive language would have been used to bring it within the Act, had it been thought right to do so.

I arrive at the conclusion that the grant has not been affected by the Act which in no way limits the rights under it so far as the abutment is concerned.

Holding this view I decide, therefore that the Act may be construed so as to apply separately to the abutment, and separately to the extension. This disposes of the 3rd. position.

The fourth position is directed to the question of estoppel which is raised by the 3rd paragraph of the amended reply, where it is set out that the extension having been made under 27 Vic. c. 5, and 52 Vic. c. 20 the proprietor or tenant by whom it was made, having on divers occasions by their conduct admitted that the said enactments applied to the lot in question, and having taken the benefits and advantages of the said enactments, he and his grantees are equally bound to accept the restrictions imposed and the Defendant should be estopped from asserting the alleged grant in fee simple from the Crown.

In argument the question of estoppel was not confined to the point raised by the reply but was extended to another point viz :—that Defendant for the reasons given above should be estopped from denying that the two Acts above mentioned applied to the abutment.

In support and denial of these positions Counsel on both sides cited numerous authorities. I would say here that I have not referred in my judgment to very many of them, for the reason, as will be apparent from the view I have taken of this case, that it was not necessary for me to do so, their bearing and application not requiring them to be specially dealt with.

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While it was admitted that the grant to Palacios was a valid one and gave him certain rights prior to the extension, it was contended that the Act of 1864 included him as the proprietor of land on the South Side of Bay St., and that on his adoption of the Act he became bound by it, and he and his successors in title should be estopped from setting up the grant from the Crown to escape from the restrictions of the Act.

For the reasons already given as to the construction of the Act and its effect upon the grant to Palacios I do not think this a tenable position.

No other proprietor was in the position of Palacios. He alone held the abutment lying in front of his South side property in fee simple. The others it may rightly be assumed held theirs as appurtenances to their lots on the South Side. What is urged as an adoption by him of the Act of 1864—is asking sanction to build, and to erect a staircase, which he could have done under his grant and which I refer to hereafter.

The rule as to estoppel in *pais* which is urged here is laid down in *Pickard vs. Sears*, 6 Ad. El. 469. This report is not in our Library and I quote the rule from the judgment of Parke B. in *Freeman vs. Cooke*, 18 L. J. Ex. at p. 119 where that learned Judge says, "That rule is that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

and

adds:—"The principle is stated more broadly by Lord Denman in the case of *Gregg vs. Wells* where his Lordship says that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict,

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"cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving."

The doctrine is again set out with great clearness in *Carr vs. London and North Western Railway Co.*, 10 L. R. C. P. 316, where certain propositions of such an estoppel are given by Brett J.

"One such proposition is if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

"Another recognized proposition seems to be that if a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existance of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existance of such a state of facts. And another proposition is that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of fact, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way, to his damage, the first is estopped from denying that the facts were as represented."

"There is yet another proposition as to estoppel. If in the transaction itself which is in dispute, one has led another in to the belief of a certain state of facts by conduct or culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second cannot be heard afterwards, as against the first to show that the state of facts referred to did not exist."

Now, in what way has Palacios been brought within these propositions?

His acts it will be remembered were done prior to any extension under the Act of 1864.

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He made no statements in dealing with the Board differing from what are now put forward by the Defendant. He repeatedly referred to his freehold right and the Defendant relies upon it now ; and no damage or prejudice has been shown to have resulted to the Board from Palacios's acts.

Upon the point that the successors in title of Palacios should be estopped from setting up the grant from the Crown, I do not consider that his acts can have that effect.

The Defendant so far as the abutment is concerned is not taking up a position differing from that assumed by Palacios, and the most that can be alleged against Palacios is that he asked for privileges which, in ignorance of his legal rights, he did not know he possessed and believed it necessary to ask for.

If in his lifetime proceedings had been taken against Palacios, would he have been prevented from showing, that, acting as he did through ignorance of his legal rights, he ought not to be estopped from asserting those rights against the Board ?

I should say not.

The cases of Keane vs. Rogers 7 L. J. Q. B. p. 285, and Newton v. Lidyard 18 L. J. Q. B. p. 53, support this position.

Nor do I consider that the acts of Webb and Menendez, can have the effect of interfering with the operation of the Crown grant by limiting the erection of buildings to one half of the Southern frontage of the abutment ; although such acts in my opinion have the effect of bringing the extension within the Act of 1864, (27 Vic. c. 5.)

I have given much thought and consideration to this case and the many important questions that have arisen in it.

My judgment proceeds upon the rights of the parties claiming under a Crown grant with respect to the abutment, and has no application to other abutments not held under such a grant.

I grant an injunction restraining the Defendant from proceeding with the erection of the building entered upon by

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him in so far as it extends beyond the the Northern wall of the building now standing upon the abutment, and I order and direct that the Defendant do remove such part within 60 days from this date.

The question of costs has been carefully considered by me and after mature deliberation I have decided to leave each party to pay his own costs, and I so order accordingly.

Counsel for Plaintiff :—*Bertram, Attorney General.*

Counsel for Defendant :—*Malcolm and Davies,*

ADMIRALTY SIDE.

OUR SOVEREIGN LORD THE KING *vs.* 224 BALES OF COTTON AND A QUANTITY OF COTTON SEED MEAL AND BRAN BROUGHT TO PORT AS DERELICT FROM DUTCH S. S. "ANDANIA."

Derelict—Property found at Sea in situation of Peril—Persons on board—Salvage—Discomfort—Slight injury to vessels—Ordinary merit—

1905

May

The Dutch Steamship "Andania" was found ashore on the Cay Sal Bank in the possession of a number of men forming the crew of certain American vessels.

A representative of the underwriters was also on board.

The master and crew were away.

Certain salvors from the Bahamas salvaged a portion of the cargo. They were compelled on two occasions by reason of bad weather, to leave the ship. Several of the vessels sustained slight injuries.

The captain returned while the salvaging operations were proceeding.

Held, that property found at sea in a situation of peril, with persons on board—whether belonging to the ship or not—is not derelict.

Held further, that certain difficulties, losses and discomforts, connected with salvage services are the natural consequences of such services and cannot alone be deemed of extraordinary merit so as to entitle salvors to more than an ordinary amount of salvage.

SIR O. D. MALCOLM, C.J.: The above actions have been before the Court for some time, the first having been commenced by the issue of a Summons and a Warrant on the 21st January last under which latter the cotton proceeded against was arrested on board of the "Kate Sturup," "Mischief," "Glynn" and "Leaon."

On the 28th January another action was instituted against the hull of the vessel, from which the goods under arrest had been taken, and the remaining cargo on board.

A quantity of cargo consisting of cotton seed meal and bran was salvaged and brought to port after this latter date.

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The services rendered were completed on the 4th March, as according to one of the affidavits of John T. Albury that was the date of the departure of the last vessel at work.

Matters remained in abeyance until the 2nd April when an application was made on behalf of Mr. Lewis Taylor, Agent for the National Board of Marine Underwriters in New York for leave to intervene on behalf of his principals.

The Attorney and Advocate General consented upon the proper bills of lading, upon which the claim was based, being filed in the Registry. This was done on the 10th April when, upon the application of the Advocate General, the two actions were consolidated and the hearing on affidavits fixed for the 20th April last, on which day arguments were had before me.

The facts connected with the case are contained in the affidavits of Arnold Ingraham, master of the "Kate Sherman," John T. Albury, master of the "Glyn," and Granville Knowles, master of "Leaon," by which it appears that, having received information of the stranding of a steamship, the three vessels sailed for the Cay Sal Bank where they arrived on 17th January last.

The wrecked vessel proved to be the Dutch s.s. "Andania" lying on the Cay Sal Bank about $\frac{1}{2}$ mile from the Gulf Stream and about 5 miles from Cay Sal, and in the possession of a number of men forming the crews of about 20 American vessels presumably from Key West.

A representative of the underwriters was also on board.

The master and crew of the "Andania" were sworn and, from an affidavit of Arnold Ingraham, I gather that the master had left with his crew because they refused to remain.

The parties in question evidently disputed the right of the salvors here to render assistance in salvaging cargo on the ground that the wreck was on the high seas, as against the contention of the Bahamian Salvors that it was stranded in our waters.

The affidavits of Ingraham and Knowles are conflicting as to the conduct of the men in the American vessels, the former alleging that his party was obliged to force themselves on board, the latter stating that although the men in possession were not disposed to make room for them, yet they did not "try to prevent our getting alongside," allowed them to work in the fore part of the ship, and that each party worked independently of the other, moving and doing as it suited them.

The master of the "Andania" returned to the wreck about 23rd January and directed the salvors herein to leave his ship, doing so in writing. This however they refused to do and, as Ingraham states in his affidavit, he "disputed his (the captain's) right to resume control."

The entire case is submitted to me upon the affidavits of 3 of the salvors. There are no counter affidavits and upon certain material questions I am left to draw inferences.

The first question is whether the property was derelict when salvaged?

Derelict is thus laid down in the books: "Derelict signifies a boat or other vessel found abandoned at sea without any person in her." Pritchard's Adm. Digest 822.

"*Prima facie*, property found at sea in a situation of peril, and not in the possession of any person, is derelict; and it belongs to the owners to show that it was left *cum animo revertendi*." Marvin on Salvage, 133.

With these definitions, the "Andania" could not have been derelict so far as the salvors herein are concerned, unless the words "persons on board" are intended to mean "persons belonging to the ship," which can hardly be contended for, because, in the case of the "Atlas," 1 Lush, 521 and Pritchard, 824, where a party of salvors found a vessel without any one on board, they claimed it was derelict, but it being shown that the vessel had been discovered by another party, prior to the second party, who had quitted for a temporary purpose, it was held that the vessel was not derelict when boarded by the second party, but had ceased to be so when first taken in tow.

Apart from this, how am I to know whether these first boarders had not been placed in possession by the master and were not working under his orders?

He had the right to resume possession before any one discovered the ship, and if he did, his vessel would not be derelict when boarded by anyone afterwards.

That he did return on one or more occasions, as shown in the evidence, would give strength to the inference that he had the intention of returning when he left, which, he informed Ingraham, he was obliged to do by the action of his crew.

The presence of an underwriters' agent was offered as evidence that the master had abandoned his vessel *sine animo revertendi*, and *sine spe recuperandi*.

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Mr. Taylor was examined on this point and said such presence did not imply an abandonment, but it was consistent with it.

The abandonment so referred to is a different one from that required to constitute a derelict.

This incident is however of no importance except as showing that there was some person on board when the salvors herein reached the ship.

From the facts given I have come to the conclusion that there is not sufficient evidence before me to decide that this vessel was ever a derelict; nor is it necessary for me to do so—as I am satisfied from the evidence that she was not derelict when reached by Ingraham and others. It therefore remains for me to deal with the case as one of ordinary salvage.

I will now take up the character of the services rendered in order to enable me to make an award of salvage.

In Salvage Services there are certain ingredients which must exist.

These are fully set out in the "Clifton" 3 Hagg, 121 and are referred to in Roscoe p. 109 as follows:

"The ingredients of a Salvage Service are first, enterprise in the Salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow-subjects:

Secondly, the degree of damage and distress from which the property is rescued—whether it were in imminent peril and almost certainly lost if not at the time rescued and preserved.

Thirdly, the degree of labour and skill which the Salvors incur and display, and the time occupied. Lastly the value. Where all these circumstances concur, a large and liberal reward ought to be given; but, where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*."

Now what are the facts of this case? I find that the salvors numbering about 180 men in 14 vessels arrived at the wreck at different times after the 19th January last, and were engaged in salvaging property until the 4th March—with four exceptions, each of the vessels made one trip only. During the salvaging

operations they or some of them, were compelled on two occasions by reason of bad weather to leave the ship, remaining away some days. The only damage sustained was injury to the "Lea-on" caused by the supposed forcing alongside of the ship; and the loss of an anchor and injury to sails and knees of the "Kate Sturup" while so away from the ship under shelter of the cay.

The seas are described as breaking over the ship, and much discomfort complained of from want of sleep.

The difficulties of the services are said to have been increased by the interference of the American salvors. I am not satisfied of the entire correctness of this allegation when I compare the affidavit of Knowles with that of Ingraham.

But admitting it existed it could not be urged as a reason for enhancing the value of the services rendered to the property here. It could only have been a charge against the other salvors if they were before me.

No doubt the action of the American salvors in taking charge of the "Andania" and continuing on board after the arrival of the Bahamian salvors prevented the latter from salvaging more than they did. This however is an element in the case which cannot be dealt with by the Court in these proceedings.

I consider the present case as one of ordinary salvage services, and while there may have been difficulties, losses and discomforts, connected with them, it must be remembered that those are the natural consequences, where services, outside of ordinary work and labour, are rendered, and for which a higher rate of remuneration is given.

According to the reported cases where services are of extraordinary merit the salvage is large; where of an ordinary character, not so.

Further where the property is large a smaller proportion or sum is given than in cases of small value:

I will refer to a few cases in which I include those cited at the Bar.

Several of them are cases of derelict and deal with the proportion that salvors of such are entitled to;

Commencing with the "Aquila" 1 C. Rob. 39, which settled the point that in derelict cases salvors were not entitled as of right to a moiety but that the rate of salvage was in the discretion of the Court—2-5ths were given in this case.

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The "Ewell Grove" 3 Hag. 221, a case of salvage by a vessel of war, Value £6,340. Award in Jamaica of £2000, reduced by the High Court of Admiralty to £1200.

The "Cuba" 1 Lush., 15. Salvage Case. Services insignificant. Value—£1530. Award £160.

The "Reliance" 2 Hagg. 90. A Derelict case of extraordinary merit. Value £5868 a moiety given.

The "Frances Mary." Extraordinary merit in a case of Derelict. Value £600 a moiety given.

The "Craigs" 5 P. D. 189. Great merit, a case of Derelict. Value £5100 award £2300.

The "Rasche" 4 A. & E. 129. Extraordinary merit, a case of Derelict. Value £6294 award £3290.

"Jonge Bastian" 5 C. Rob 322. A Derelict case of extraordinary merit. Salvage $\frac{2}{3}$. Value £3400.

"Janet Court" (1897) P 62. A case of Derelict considerable merit. Value £7350 award £3000.

These cases, chiefly Derelict, bear out the principles I have referred to, and show that there is no strict rule as to what shall be awarded; it is solely in the discretion of the Court, based on the circumstances of each case.

I will now take up a few other cases:

"Gertrude" 30 L. J. 130. This case was cited on the point of Derelict which I have decided, but it can be referred to with regard to the Salvage. The value was about £500 award £120.

The "Scindia" 1 P. C. 241 a Derelict case. Value £31000, award £3000.

The "Trueblue" 1 P. C. 241 a Derelict case Value £1452, award £300 increased on appeal to £450.

Counsel for the Salvors brought under my notice two other cases,

The City of Chester 9 P. D. 182.

Bird vs. Gibbs 8 A. C. 559

upon the point of allowing Salvors for losses incurred in addition to salvage remuneration.

In the 1st the Salvors offered to give evidence of losses which the Judge refused to accept. On appeal it was held he should have received it.

In the head note to this case it is thus laid down :

"Per Brett, M. R. That the Judge of the Admiralty Court is not bound *ex debito justitiæ* to admit such evidence or to decree in terms that a specific and ascertained amount shall be paid to Salvors in respect of damages or costs caused by rendering Salvage Services, for he is not bound always to award a sum sufficient to indemnify a Salvor. . . ;" and in the same place two other Judges lay it down as follows :

"Per Baggallay and Lindley L. J. J. Where salvage services have occasioned salvors serious pecuniary loss, and where the value of the ship and cargo saved is ample not only to defray loss sustained by a salvor, in addition to a proper sum for the master and crew, but also to leave a substantial surplus for the owners of the property saved, the salvor should be remunerated where possible with a sum sufficient to reward him for the risk and labour and to cover damages and expenses incurred through rendering the service. . . ."

In the 2nd case Bird vs. Gibbs, such losses were allowed by a Judge. On appeal it was objected that such losses should only be generally taken into account when estimating the amount to be awarded for salvage remuneration.

The judgment on this point is given in the following words :

"Their Lordships are of opinion that this objection is not well founded. It was argued that, by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over ; but this is only on the supposition that the Court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding £5000 for simple salvage services. It is not to be presumed that the learned Judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the £5000 a reasonable amount for salvage reward, wholly irrespective of damages and expenses."

"Their Lordships are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and ex-

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pensive, and sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses, and to afford also an adequate reward for the services rendered. In the assessments of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure to him. . . ."

In the case before me no losses are shown to have been sustained except those met with by the "Leaon," and "Kate Sturup," which cannot be deemed "serious losses" as in the case of the "City of Chester."

My award will, in my opinion, cover any losses or damages sustained.

There is some difficulty in arriving at the exact value of the property saved.

The appraisement gives that of the Cotton and Linters at £675 19s. 6d., 286 bags of bran at 3s. 8d.—£52 8s. 8d., and 112 bags of damaged meal at £12 12s.

The cotton seed meal is contained in bags of two sizes, the larger rated at 6s. 4½d., the smaller at 3s. 11d.

It is stated that it would be impossible without much expense and considerable delay to ascertain the number of bags of each size—and the appraisers report that the valuations are based on the supposition that the meal is undamaged.

I have endeavoured to form an idea of their approximate value by taking the number of the large bags as $\frac{2}{3}$ of the whole, and the smaller at 1-3rd, a proportion which has been furnished to me by the Marshal, and adding the value of the bran and damaged meal have placed the entire value of these articles at about £1672, bringing the total to about £2348.

After carefully considering the character of the services in this case and all the surrounding circumstances, I make the following award, which is based on a valuation reached after deducting the estimated storage charges to the 29th April, the usual practice in cases of salvage. See Roscoe p. 128—the case of the "Monteagle" decided here.

To the salvors of the Cotton and Linters the sum of £208.

To the salvors of the cotton seed meal and bran the sum of £552.

To Arnold Ingraham as leader of the salvors the sum of £5.

I do not allow the charges for pierage and labour hire.

The claim for expenses of the Deputy Marshal has given me much thought. His appointment, for the purpose of arresting the vessel and cargo in her, was the act of the Court in the interest of the salvors, of which he was one. When the master of the "Andania" left the wreck the Deputy Marshal may have assumed that there was little hope, if any, of saving the vessel, and he should have returned here by one of the salving vessels on the 3rd or 4th March. His not doing so, it is stated, was in consequence of instructions to remain, which entailed the larger part of the expenses incurred.

After much hesitation I have concluded to allow the charge of £5 for hire of a vessel despatched to bring him here; and the sum of £4 3s. for possession fees.

I do not allow any of the other items in the claim as a charge against the property saved.

The provisions supplied by H.M.S. "Charybdis" having benefit of the Deputy Marshal and other salvors at the wreck must be paid for by them, and I direct that the sum of £3 19s. 4d. be deducted from the salvage on the cotton seed meal and paid over by the Registrar to the Advocate General.

I give the salvors their costs.

Counsel for the Crown :—*The Honble. the Advocate General.*

Counsel for Claimants :—*Malcolm.*

Counsel for Salvors :—*Bertram—Attorney General.*

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EQUITY SIDE.

IN THE MATTER OF THE WILL OF THE LATE WILLIAM KIRKWOOD DECEASED, AND IN THE MATTER OF "THE TRUSTEE ACT, 1893," AND "THE TRUSTEE RELIEF ACT, 1904."

1905.

December.

*Trustees—Control of Court over—Power of investing Trust money—
Nature of Investments—Application to Court as to—Existing
Investment—Continuance of—Trustee Investment Act
1888—Trustee Act 1893.*

A, a testator, appoints X. Y. Z his Executors.

After making various pecuniary bequests he directs his executors to sell the residue of his real and personal estate and to invest the proceeds in certain securities. At the time of his death the testator was possessed of certain monies in the hands of his bankers. The executors were to use their judgment in dealing with these. After payment of all debts and legacies the residue was to be invested by the executors in the names of trustees who were to apply the interest arising therefrom in the payment of certain annuities.

The property was never legally and properly vested in these trustees.

Held, that although existing securities are not among those mentioned in 1st section of Trustee Act 1893—if the will does not expressly forbid investments in existing securities—they may be continued. Trustees are not bound to follow the Trustee Act but have the right to apply to the Court for instructions or advice as to the course to be pursued.

Held, that it was not legal to allow interest to accumulate in New York for investment in place of principal collected here and applied in payment of annuities.

Held, that neither the Minister of the Presbyterian Church of Saint Andrew nor the Rector of Christ Church is a Corporation.

SIR O. D. MALCOLM, C. J. : This is an originating Summons taken out on behalf of the Reverend Robert Taylor Bailey, Minister of the Presbyterian Church of St. Andrews in the City of Nassau ; and the Reverend Charles E. Meeres, Rector of Christ Church in the said City for the determination of certain questions arising upon the will of the said William Kirkwood, and hereafter set forth :

According to the "Statement of Facts" filed in these proceedings it appears that the said William Kirkwood [hereafter called the testator] made his will dated the 3rd day of December 1888 and named as his Executors the Hon. Dr. Wm. Maclure, the Reverend Robert Dunlop and Mr. Alfred E. Moseley all of the City of Nassau,

After making certain pecuniary bequests the testator directed his Executors to sell the residue of his personal and real estate and to invest the proceeds in public stocks funds or securities of the United Kingdom of Great Britain and Ireland, or of the United States or of the Government of the Bahamas or of some other British Colony.

At the time of his death the testator was possessed of a large sum of money in the hands of his bankers Messrs. Baring Brothers of London, and James G. King & Sons of New York. This money and certain bonds in railway and other companies the testator directed his Executors to use their judgment in dealing with and to retain them in their existing form or to re-invest them as they thought fit, but in making any change to consult Messrs. James G. King & Sons. The will directed that after payment of all debts and legacies &c. the residue of the Estate was to be invested by the Executors in the name of certain trustees who were required to apply the interest arising therefrom in the payment of annuities of £24 per annum to women of good character and respectability—to be reduced or increased as the annual interest and income diminished or increased.

The trustees appointed were the Reverend R. Dunlop Minister of St. Andrew's Presbyterian Church and his successor in the Ministry of St. Andrew's Church, the Reverend Robert Swan Rector of Christ Church, and his successor in the Rectorship of the said Church and Mr. John Sargent Darling of the City of Nassau, merchant, provision being made by which the other trustees could appoint a successor to Mr. Darling in case of his death resignation or removal from the Colony.

There are three codicils to this will which need not be further referred to as they do not affect the questions submitted.

The testator died on the 9th December 1888 and after probate of the will I assume that the Executors carried out the duties imposed upon them but there is nothing to show me that the estate of the testator was ever vested in the Trustees.

The will was evidently not prepared by a lawyer which clearly appears from a perusal of it, and I am afraid there is lit-

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tle doubt that while the original trustees faithfully and scrupulously carried out the instructions of the will the property was never legally and properly vested in them.

The Executors of the will and the original trustees named in it are all dead and there is nothing to be gained by pursuing any inquiry as to the legality of their official actions.

What I have to look to is what has been done since their death, I have to examine the actions of those who have undertaken the execution of the trusts of the will, and ascertain the responsibilities imposed upon them by such actions.

In paragraph 6 of the Statement of Facts, it is alleged that the applicants before me being respectively "Minister of St. Andrew's Presbyterian Church," and "Rector of Christ Church," are by virtue of their tenures of such offices the Trustees of the "Annuity Fund" created by the Will.

It is in that belief that these gentlemen have carried on the provisions of the Will. They appointed a successor to Mr. Darling after his death, and have dealt with the property unquestionably according to the wishes of the testator so far as relates to the payment of the annuities and seeking the advice of his agents as to investments.

Neither the Minister of the Presbyterian Church of St. Andrew, nor the Rector of Christ Church is a corporation by common law or statute and therefore upon the demise of the reverend gentlemen named in the will no rights conferred upon them vested in their successors. The dictum of Lord Herschell in *Kelroe vs. the Marquis of Lansdowne* (1893, A. C. p. 457) as to the status of a Roman Catholic Bishop so far as regarded the rights vested in him devolving on his successor is an authority if any were needed for this position.

The authorities cited by counsel from Mews's Digest while not positively applicable lend support to this view. While the course followed by the applicants herein has had no legal sanction, and while their action may not be made a ground for any charge against them; and while possibly a continuance by them would not result in any injury to the trust and the beneficiaries under it, yet it is not proper or desirable that they should continue in their present position; and I shall by this decree make such an order as will remedy the state of things existing on this point.

Before I deal with the questions submitted I will make some reference to the powers and duties of the trustees, as I understand them, with regard to investments and the control of the Court over them.

Prior to the passing of the "Trust Investment Act 1889" and the "Trustee Act 1893" which permitted and permits trustees to invest in certain securities when not forbidden by the trust instrument; trustees as I take it could invest trust monies upon such securities as they deemed safe and proper, and this without application to the Court—but they ran the risk of being charged with a breach of trust if such securities became worthless and were such as no prudent man would have dealt in.

Many instances of applications to the Court by trustees for advice and as to their power to make certain investments are to be found in the books.

I would mention *Lewis v. Noble* 8 Ch. D. 591, *Manchester Royal Infirmary vs. Atty. Genl.* 43 C. D. 420; *In re Dick*, (1891) 1 Ch. 423; *Hume vs. Lopez* (1892) A.C. 112.

These cases were decided before the passing of the "Trustee Act 1893," but the principles laid down would apply on a construction of similar points arising under that Act.

These applications and the decisions on them no doubt led to the passing of the various acts on the subject culminating in the Trustee Act 1893 relieving trustees from the responsibility of deciding what were safe investments and avoiding an application to the Court when in doubt, but not as I understand it compelling them to make such investments; as the wording of the Act (1st Sec.) is

"A trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands whether at the time in a state of investment or not, in manner following, that is to say :

A list of securities is then given.

Does it prevent them from applying to the Court for permission to invest otherwise? I should think not; but the Courts in England would very probably refuse such permission where such a number of securities are given to choose from, unless some very substantial reasons were given for the departure.

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This matter being now before me I am to consider what the applicants (being hereafter appointed trustees) had best do in the interests of the beneficiaries of the trust.

Would it be desirable or advantageous to convert the present securities into cash at once, or from time to time, and direct the investment in any of the securities set out in the Trustee Act 1893, or in any of those named by the testator with regard to his real and personal estate here, a direction which it must be remembered was given to his executors and not to his trustees.

So far as the latter (the trustees) are concerned, the testator may be considered as inclining to investments already made by him and in which almost the entire funds of the trust now remain.

Are the trustees bound to invest according to the Trustee Act 1893, or can they not ask the Court to legalize the existing investments and permit their continuance and allow future accumulations to be similarly invested?

Unless "expressly forbidden" by the will, the Act *permits* an investment in the securities named. The will does not forbid and the only reference in it to investments is the direction given to the Executors with regard to the estate other than the securities abroad. Nothing is said as to what the trustees should do beyond consulting the bankers in New York.

In my opinion they are not bound to follow the Trustee Act but have the right to apply to the Court for instruction or advice as to the course to be pursued.

To compel a change of the present securities into any of those named in the 1st Sec. of the Trustee Act 1893 must involve difficulties and delay, and reduce the income of the fund materially.

It would be necessary to sell out from time to time portions of the fund and remit the proceeds to London for investment in the statutory securities for to dispose of the entire fund at one time for remittance would cause for a certain period a cessation of interest from which to pay annuities.

This delay and attendant expense would create inconvenience to the annuitants and after a completion of the investments in England the interest there obtained being less than the present rate would lead to the diminution of the amount

at the disposal of the trustees and a consequent reduction in the number of the annuitants.

It may be said that such contingencies were in the mind of the testator as he directs "the number of annuitants to be reduced or increased as the annual interest and income shall be diminished or increased," but he could only have meant where such diminution took place from ordinary causes and not by a change of securities on the part of the trustees voluntarily and without reasonable cause.

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I may place myself in the position of the testator and ask would he if alive have made such a change as is here suggested, or would he not have retained the form of the present investments being satisfied of their stability?

Is there any reason to doubt this stability now? No such doubts have been advanced during the argument. Is there any reasonable cause shown for the change?

None has been offered.

Taking the fact that the testator himself selected this form of security and neither directed nor advised that they should be changed, and that the persons who he directed should be consulted as to any change have never advised any, but always when necessary chosen similar securities when occasion arose for investment; and further considering that the securities in question have up to the present proved to be safe and sound ones I am of the opinion that they may be still deemed safe and sound and such as prudent trustees may continue to hold and to select in the future.

In arriving at the conclusion I have, and making the order which I do, it is not to be taken that there would be any objection to the trustees applying to the Court at any time for leave to change or vary such securities to those under the Trustee Act, should there arise a necessity for doing so.

I will now proceed to deal with the points raised by the summons.

The testator directed his Executors to sell his real and personal property and invest the proceeds in certain securities named by him. This property was sold and it appears to have been secured by mortgages on realty here, instead of the securities named.

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The monies due on these mortgagas were paid to the applicants herein who, instead of investing them, applied them in payment of the annuities granted by the will; at the same time permitting the interest arising from the American investments next herein mentioned to accumulate and be invested in the United States.

The Will further dealt with *monies* in the hands of the testator's agents in London and New York.

There is nothing before me to show what these were and I can only assume that they were used in the purchase of United States railway bonds and kept together with other bonds of that description held by the testator at the time of his death, as at the present moment with the exception of a Bahama debenture, for a £100 and £35 19s. 5½d. in cash, the trust fund is composed entirely of United States railway securities totalling \$56000.

By his Will referring to the railway and other bonds possessed by him the testator directed his Executors to use their judgment in retaining them, or re-investing them which would point to the fact that they would be paid which has actually happened in the case of some of them, and in making such reinvestments he required his Executors to consult with his then New York agents.

When Mr. Bailey took charge of the trust in 1891 in conjunction with the Revd. Dean Young who was then Rector of Christ Church and Mr. John S. Darling, the funds consisted of United States railway bonds amounting to \$51000 yielding an annual income of \$2739 a sum of £17 18s. 4d. and the two mortgages already dealt with.

Since that time through using the mortgage monies and not drawing the interest from the railway bonds, but allowing it to accumulate and be invested in bonds of a like character as the principal, the trust fund has now reached (exclusive of the Bahama Debenture and cash) the sum of \$56000, with an income of \$2815.

Some of the securities existing in 1891 fell in from time to time and the amounts have been invested by the applicants in bonds of other railways in the United States.

In all matters connected with these trust funds the advice of the testators agents in New York was always sought and acted upon by the applicants herein while they continued in busi-

ness and after their withdrawal therefrom of that of a firm recommended by them.

This was an injunction imposed by the testator on his Executors and not on his trustees but the gentlemen assuming to act in this latter capacity no doubt felt, and rightly, that they were adopting a right and prudent course.

Upon the first question submitted I see no objection to the trustees of the Fund as hereafter nominated continuing the investment of such funds in the securities now existing, some of which must have existed at the death of the testator.

A reference may here be made to the testator's will upon this point while he gave a direction as to the investment of his property here, he gives none with respect to that abroad. It would appear to have been his intention that it should remain upon the securities in which it then stood or in which it might be placed under the advice of his agents. It can therefore be gathered that he deemed these investments sound and stable, and so they have proved to be up to this time.

If these assumptions are correct there need be no change made, and this conclusion is supported in some measure by the following case ; Arnould vs. Grinstead (1872) W. N. p. 216 where a testator, all his personal property being invested in Government or other securities, and bonds, etc. directed it to be held in the same or the like investments.

The investments had been made by the testator, and comprised Colonial and Foreign Government bonds, Railway Stock, and New 3 per cents.

The question was whether the trustees were justified in retaining the trust funds upon these investments.

Vice Ch. Bacon said the "securities on which the trust funds were invested could not be altered without violating the positive direction of the will, and accordingly held that the investments were proper investments, and within the meaning of the will."

As to the 2nd question several considerations arise complicated by the fact that the applicants have never been trustees. The answer to be given is that while in strictness the applicants were not justified in the course adopted yet the court will relieve them from any liability as it would have done under like circumstances had they been properly constituted trustees.

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Upon the 3rd question whether the applicants were justified in investing the accumulations arising from the American Securities, and money falling in on the maturing of any of those securities otherwise than in securities named in the testator's Will.

From the reasoning I have adopted with regard to the Will of the testator in dealing with the 1st question the answer to this question may be given on similar lines.

The testator drew a distinction between his property here and that abroad.

The former was directed to be invested by the Executors in the class of securities named by him which they never did.

The latter from the views I have expressed was to remain in the form in which it existed unless changed after consultation with his agents. Whatever change has been made was after such consultation but by the applicants, and not the Executors and the accumulations referred to in this question, as I understand it, have been invested in securities of a similar character to those of the original investment and I see no reason why they should not so remain.

I answer to questions raised in the Originating Summons as follows :

1st. The applicants so far as any power existed in them were justified in continuing the investments as they stood at the testator's death.

2nd. They were not in strictness justified in dealing with the funds collected in Nassau as they did nor in permitting the investments abroad to accumulate and then be invested as they were.

3rd. They were not as in answer justified in making the investments named herein.

4. The answer to this question and the course to be pursued will be that as hereafter the applicants will be regularly appointed trustees of the Fund according to the order to be made herein ; that the Court will and doth authorize and empower such trustees to continue to keep the trust funds on the securities left by the testator and those made since his death, and, subject to the order of the Court first obtained, to vary them from time to time as occasion may require ; and to in-

vest them and any accumulations arising from surplus income in similar securities.

5. That the applicants are hereby relieved from all liability and responsibility for any act or acts of theirs in connection with the execution and carrying out of the trusts of the testator's will which they assumed they had the right to do.

I make the following order. It is hereby ordered that the Revd. R. T. Bailey the Minister of St. Andrews Presbyterian Church, and the Revd. C. E. Meeres, Rector of Christ Church be and are hereby named and appointed Trustees under the will of W. Kirkwood, deceased (until the further order of the Court) to carry out and perform the various trusts and declarations set out and contained in the said will; with power to nominate a layman to be associated with them in the execution of the said trusts, and from time to time as occasion may require, to appoint a successor to such layman in the event of his death, resignation, incapacity or permanent absence from the Colony, and for these purposes the trust estate and funds are hereby vested in them.

I direct that the costs incident to this application including the costs of the Attorney General be paid by the Trustees from any monies in their hands or if necessary from the principal trust funds.

Counsel for the Crown (as being interested in all charitable Trusts.)—*The Attorney General.*

Counsel for the Trustees.—*Malcolm.*

The Will of the late William Kirkwood and
"The Trustee Act, 1893," and the "Trustee Relief Act, 1904."

EQUITY SIDE.

1906

January.

IN THE MATTER OF THE WILL OF THE LATE
CATHERINE ANN MAURA.*Deed—Construction of—Execution of Power—Will of Married Woman.*

SIR O. D. MALCOLM C. J.—In this matter an originating summons has been taken out by William Joseph Maura the husband of the said Catherine Ann Maura; and William Henry Handford Maura, Kathleen Janette Maura, Alice Elsie Lena Maura, and Bruce Marshal Maura (by E. W. T. McPherson, his next friend) the children of the said William Joseph Maura and Catherine Ann Maura, for the determination of the following questions:

1. Whether under any or either of the deeds referred to and set out in the statement of facts filed herein the real property mentioned in such deeds or any part thereof became vested in the said Catherine Ann Maura so as to enable her to dispose of the same by will, and, if it did not, then in whom is the property now vested and to whom does it belong.

2. If such real property or any part thereof did vest in the said Catherine Ann Maura, whether the will made by her and dated the 28th day of May 1887 effectually disposes thereof or of any part thereof.

3. How the costs of and incidental to this application are to be borne.

The said Catharine Ann Maura was the daughter of Charles Joseph Marshall. She was married to the said William Joseph Maura on the 16th April 1878, and died on the 25th day of June 1887.

According to the statement of facts filed in the matter of this application, supported by the affidavit of the said William Joseph Maura, and from an examination of the several deeds submitted for my consideration it appears that the said Charles Joseph Marshall being possessed of certain real estate in this Island and of mortgages on real property and personalty made and executed certain deeds in respect thereto.

First.—A deed dated 11th of March 1873 granting and conveying to William Henry Hall of the said Island a lot of

land in the Eastern District of the Island of New Providence (hereinafter referred to as "The East Bay Street Property.")

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This deed contains a recital that the said Charles Joseph Marshall was desirous of settling on his daughter C. A. Marshall the freehold property mentioned and described in the said deed, and that the said W. H. Hall had covenanted to act as a trustee for her and to accept a release and conveyance of the said property for the uses and upon the trusts thereafter set forth; and the property is then conveyed to the said William Henry Hall in fee upon the following trusts that is to say:

"To such uses upon such trusts to and for such intents and purposes and with under and subject to such powers, provisions, agreements and declarations as the said C. J. Marshall, by any deed or deeds with or without power of revocation to be by him sealed and delivered in the presence of two or more credible witness or witnesses should from time to time direct limit or appoint and in default of and until such direction limitation or appointment and so far as every or any such direction limitation or appointment shall not extend to the use, during the lifetime of the said C. J. Marshall, of the said C. A. Marshall and her assigns without impeachment of waste and from and immediately after the death of the said C. J. Marshall if he should die without having made any such direction limitation or appointment as aforesaid leaving the said C. A. Marshall him surviving then and in such case to the use of the said C. A. Marshall her heirs and assigns forever but in case the said C. A. Marshall should die in the lifetime of the said C. J. Marshall leaving lawful issue her surviving then to the use of all and every of the children or child of the said C. A. Marshall so surviving her as aforesaid and their assigns during the lifetime of the said C. J. Marshall and from and immediately after the death of the said C. J. Marshall, if he should die without having made any such direction limitation or appointment as aforesaid to the use of all and every such children or child as aforesaid, his her or their heirs and assigns forever. But in case the said C. A. Marshall shall die in the lifetime of the said C. J. Marshall without leaving lawful issue her surviving or having died leaving any such issue all such issue shall die in the lifetime of the said C. J. Marshall then and in such last mentioned case to the use of the said C. J. Marshall his heirs and assigns forever."

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This deed contained the usual proviso enabling the said C. J. Marshall at any time to revoke the uses trust intents and purposes powers provisos &c. contained therein and to direct limit and appoint such new or other uses, trusts, intents, powers, provisos, &c., concerning the premises which the said C. J. Marshall might think proper.

2. A deed dated 3rd April 1873 granting and conveying to the said W. H. Hall certain real and personal property held by the said C. J. Marshall upon mortgage.

With the exception of one parcel of real property conveyed by this deed, all of the property included in it has been, I am informed by Counsel, evidently disposed of; it is not included in this application and need not be further referred to.

The exception which I have to deal with will hereafter be referred to as "The Boyd property."

This property (Boyd's) with the other properties is conveyed to W. H. Hall in fee [subject to the equities of redemption of the mortgagors] upon similar trusts as those contained in the deed of 11th March, 1873, disposing of the "East Bay Street property."

Each of these deeds has a recital, slightly different in its wording, that the object of the settler in conveying the lands is to make provision for his daughter Catherine Ann Marshall; and also contains a proviso enabling the said C. J. Marshall to revoke the uses and trusts set out therein and to create new and other uses.

3rd. A deed dated 24th December 1874 between the said C. J. Marshall and the said W. H. Hall by which in exercise of the power of sale contained in the mortgage of such property, the "Boyd property," the said Charles Joseph Marshall conveyed the same to the said William Henry Hall, freed from the equity of redemption of the mortgagor, upon the trusts contained in the deed of the 3rd April 1873.

Both properties were then held by the said William Henry Hall upon the before mentioned trusts, free from any incumbrances, and they were subsequently dealt with by the said Charles Joseph Marshall, and this brings me to the consideration of two other deeds executed by him purporting to deal with

these properties and I have to decide what effect those deeds have on the trusts by which such properties were bound; and whether they have altered such trusts or not.

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The first of such latter deeds that I will take up is one dealing with "the East Bay Street property," which I have placed first in order in describing the properties, although its date is later than the 2nd deed so executed by the said Charles Joseph Marshall.

I will here number and refer to it as the fifth deed.

This deed is dated 8th February 1887, and is made between the said Charles Joseph Marshall of the one part and Catherine Ann Maura of the other part (she being then the wife of the said William Joseph Maura.)

It recited that by the deed of 11th March 1873 the East Bay Street property had been conveyed by the "said Marshall to the said Hall as a trustee for the uses and upon the trusts hereinafter expressed and also contained in the aforesaid in part recited trust deed To Have and To Hold the same upon the uses and trusts therein declared of and concerning the same."

It then proceeds to set out one of such trusts, the one giving to the said Marshall a power of appointment over the land and of revocation of the uses and trusts created, and the creation of new and other uses &c.

This deed (fifth) then continues and revokes such power of appointment contained in the deed of 11th March 1873 and directs and appoints, and grants and conveys the land "East Bay Street property" to Catherine A. Maura in fee for her separate use.

While this deed may be open to technical objections it is sufficient, by the aid of the Court, to effect what is evidently intended by it, which was to vest this property ("East Bay Street property") in Mrs. C. A. Maura freed from any restrictions, an indication of this intention may also be gathered from the endorsement on the deed which reads "Deed of revocation and new appointment."

The Court will aid any defect in the execution of the

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power where the intention to execute is shown, and will render this deed effectual for its intended purpose.

This property then being properly appointed to Mrs. C. A. Maura the provisions of the 5th Section of the "Married Women's Property Act 1884," will have effect and she would have the power to dispose of it by her will.

With regard to the "Boyd property" matters are not so clear, and there are certain rules and principles of equity and of construction to be examined explained and applied before reaching an answer to the question propounded herein with respect thereto.

On the 2nd September 1884 deed No. 4 was executed and by it C. J. Marshall proceeded to deal with this property by virtue of the provisions of deed No. 2.

It will be remembered that by deed No. 2 this property was conveyed to W. H. Hall in trust to hold it to such uses as C. J. Marshall should appoint, failing which appointment it remained limited to certain other uses trusts &c. specifically described; one being the limitation to the children of C. A. Maura (on the death of C. J. Marshall and C. A. Maura) in case no appointment had been made by C. J. Marshall.

The deed further empowered C. J. Marshall to revoke the uses and trusts limitations &c. contained in it and to appoint such new and other uses and trusts &c. concerning the premises as he might think proper.

Unless therefore C. J. Marshall exercised one or the other of such powers the property remains subject to the original limitations.

I have to examine this deed No. 4 (of 2nd Sept. 1884) to discover what has been effected by it and to ascertain whether it embodies an exercise of either of the powers conferred on C. J. Marshall.

It is made between C. J. Marshall of the one part and W. H. Hall described as "a trustee nominated and appointed as hereinafter is particularly mentioned and declared," of the other part.

It then proceeds to incorporate by way of recital the parts of the trust deed No. 2 referring to this property including the uses trusts provisions limitations &c. as I have set them out when describing trust deed No. 1 on pages 3 & 4.

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It then has an original recital in these words "whereas the said C. J. Marshall for divers good and valuable considerations him hereunto especially moving hath determined by deed to confirm absolutely unto the said W. H. Hall as such trustee as aforesaid of his said daughter formerly C. A. Marshall but now C. A. Maura, the wife of of W. J. Maura Merchant without any limitation condition or reservation whatsoever and revoking annulling and making void the power of revocation appointment and disposition contained in the aforesaid in part recited deed of trust the aforesaid hereinbefore recited freehold messuage lot of land and premises with the appurtenances so as aforesaid acquired from the said John J. Boyd and distinguished in the old plan of the Eastern suburbs of Nassau by the number twenty-one, No. 21."

The testatum then sets out that for the "end intent and purpose aforesaid" C. J. Marshall did grant ratify and confirm unto W. H. Hall "as such trustee as aforesaid the Boyd property.

The Habendum is worded as follows "To Have and To Hold the said messuage lot of land &c. hereby granted and released or otherwise assured or intended so to be unto and to the use and behoof of the said W. H. Hall as such trustee as aforesaid his heirs and assigns forever."

And it concludes with a covenant for quiet enjoyment by W. H. Hall as such trustee as aforesaid.

This deed has demanded from me considerable thought and attention.

It is peculiarly drawn, and there are statements and omissions in it which tend to confuse. It mentions in the commencement that W. H. Hall is a trustee for C. A. Maura, "nominated and appointed as hereinafter is particularly mentioned and declared;" yet there is nothing to show any appointment in the deed as such. The use of these words, and those describing W. H. Hall as the trustee of the said C. A. Maura must have been intended to apply to that part of the recital of the trust deed where C. J. Marshall expresses his desire to make a provision for his daughter and thereby conveyed to W. H. Hall the property

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under discussion upon the trusts named. In making these references the conveyancer must have had in his mind the desire above alluded to ; W. H. Hall was no more the trustee of C. A. Marshall alone under deed No. 2 than he was of the children for whom provision was made in the deed upon the happening of certain events, and it was a misuse of words so to describe him.

Such an allegation could not destroy the limitations to the children which could only be done by an exercise of the power of appointment by C. J. Marshall.

The principle laid down as to when a defective execution of a power will be aided in equity is that such aid will be given where it clearly appears in writing that the intention of the donee of the power was to execute it. See Sugden on powers 5th edn. at p. 370. This principle has been followed by the Courts in the cases which I have examined and I may refer to two of them *Garth vs. Townsend* L. R. 7 Eq. 220 ; and *Kennard v. Kennard* L. R. 8 Ch. 227.

In the former monies had been settled by husband and wife subject to a power of appointment by them or the survivor by deed attested by 2 witnesses, or by will similarly attested.

No joint appointment was made.

The survivor, the wife, left a written memorandum stating that not having made a will she left this memorandum hoping that the children would be guided by it though it was not a legal document and expressed a wish as to how the property should be divided.

It was held that the memorandum failed in showing an intention to execute the power, and it was held not to be an execution of it.

In the latter case real and personal property were settled by a husband and wife in trust for such persons as the wife should appoint by any deed or instrument or instruments in writing attested by one witness, or by will attested by two.

The wife left a paper unattested stating that she wished her son to have the personalty should she die suddenly, adding that it was her intention to make it over to him legally if life was spared.

This was held an effectual appointment in favour of the son of the settled monies, as it sufficiently appeared that there

was an intention to give this property which she had the power to dispose of.

In this latter case at the conclusion of the judgment James. L. J., uses these words.

“The jurisdiction of the Court is to supply defects occasioned by mistake or inadvertence not to supply omissions intentionally made.”

This is an important exposition of the rule and I have to see whether this deed can be brought within it.

It will be noticed that in these cases the paper or instrument under consideration had not been prepared by a legal man.

What is the proper construction to be placed on this deed of the 2nd September 1884 [No. 4] applying to it the principles quoted above which guide the Court in aiding the defective execution of a power?

Can I gather from it an intention on the part of C. J. Marshall to exercise the power of appointment given to him, in favour of C. A. Maura? or, is it to be deemed instead a deed of revocation by him of the uses, trusts, limitations &c. created by deed No. 2, and the appointment of new and other uses?

I am unable to do either, I gather from it that the intention was to confirm the property to W. H. Hall, as set out in the original recital. For what purpose? Words are used stating that it is so confirmed granted and conveyed to him as trustee of the said C. A. Maura the daughter of the Settlor. I have already given my view of the effect of these words.

In my opinion the intention of C. J. Marshall, so far as I can infer it from the deed, was to deprive himself of the power of appointment and revocation vested in him by the limitation and proviso in the settlements, and to confirm the property to the original uses failing his appointment.

As shown by the affidavit of Mr. W. J. Maura dated the 5th day of January 1906 there is little doubt that both of these deeds were prepared by the same conveyancer who witnessed both, one being in his own hand writing the other in that of his Clerk.

The deed of 8th February 1887 (No. 5) clearly expresses the intention of C. J. Marshall to appoint the property named therein (“the East Bay St. property”) to his daughter and as I have al-

THE WILL
OF THE LATE
CATHERINE
ANN
MAURA.

THE WILL
OF THE LATE
CATHERINE
ANN
MAURA.

ready pointed out, with the aid of the Court, such intention is effected.

If C. J. Marshall intended the "Boyd property" to be vested in and to the use of his daughter alone the conveyancer would certainly have carried out that intention by a deed similar to the one of 1887, and, if such an intention existed at the time it was executed, and in 1887, and there had been any mistake on the part of the conveyancer, there certainly would have been an effort made to obtain the assistance of the Court to rectify it, or some other steps taken, if possible to remedy it, I have come to the conclusion that the deed of the 2nd September 1884 (No 4) was not an exercise of the power of appointment vested in C. J. Marshall, but was intended as, and is, a revocation of his power over the land described therein, a surrender of his right to revoke the trusts &c. in the deed (No. 2) and to appoint new and other uses &c., and so allow the said property to remain subject to the original trust and limitations.

I therefore answer the questions set out in the originating summons by declaring as follows :

1st. That by the deed of the 2nd September 1884 (No. 4) the property therein described "Boyd's property" was not vested in C. A. Maura alone, but still remains subject to the trusts and limitations of the deed 3rd of April 1873 (No. 2.) and the said C. J. Marshall and C. A. Maura being dead and, there being no appointment of the same by the said C. J. Marshall by deed No. 4, and no will of his recorded or produced disposing of the same, such property passes under the trust deed No. 2, and now belongs to the children of the said C. A. Maura.

2nd. That by the deed of the 8th February 1887 (No. 5), the property therein described "East Bay Street property," vested in the said C. A. Maura and the will made by her effectually disposes of it.

3rd. As this matter has been brought forward by all of the parties interested to ascertain their respective rights and not in a spirit of antagonism towards each other I direct that the costs of these proceedings be paid by them jointly.

Counsel for applicants.—*Malcolm.*

COMMON LAW SIDE.

JOHN ALFRED *vs.* THE HON. W. R. HUNT, RECEIVER
GENERAL AND TREASURER.

1905

*Specie—Goods—Necessity for Export Entry—Revenue Consolidation.
Act 1873.*

The facts in this case were as follows :—The schooner “Eastern Queen” owned by the plaintiff, left the port of Nassau in June 1905 for Kingston, Jamaica via Ragged Island. There was on board of the said schooner a large sum of money—about £500—in the possession of the captain. Before leaving Nassau the master put in a Ship’s Report Outwards (but no export entry for the specie.) On the ship’s return she was seized under section 127 of “The Revenue Consolidation Act, 1873.”

The plaintiff commenced action and a Summons for Directions was taken out, and the following issues raised :—

1. Is specie goods?
2. Was it exported under the Act?

His Honour, after dealing with the arguments put forward by both counsel said he was clearly of opinion that the word “goods” included coin, and also that such goods were shipped or waterborne for exportation, and when so shipped an export entry should have been put in.

Judgment for Defendant with costs.

Counsel for the Plaintiff.—*Solomon.*

Counsel for the Defendant.—*Bertram, Attorney General.*

COMMON LAW SIDE.

GEORGE FRANCIS CHRISTIE *vs.* WILLIAM BRANVILLE
NORTH.

1906

May.

*Wager—Deposit in hand of Stakeholder—Dispute as to result of race—
Refusal to pay—16 Car. 2. c. 7. 9 Anne c. 14.*

SIR O. D. MALCOLM C. J. stated that before the Jury was empanelled he desired to make some observations with respect to the case, and he then pointed out that, by the pleadings, the only issue raised was one of fact, and under it the defendant would have the right to begin. The parties had narrowed the issue, of which he did not complain, but the effect might be to avoid the question of the legality or illegality of the subject matter of the action, which was based on a wager upon a horse race, and, if allowed to be tried, might result in obtaining the sanction of the Court to the enforcement of a claim for which an action might not lie, unless the Court intervened.

His Honour referred to various authorities on actions of the kind tried in the Mother country which showed how they had been dealt with there, and also to the fact that the courts there had refused at times to try them—4 Blackst. Comm. Edn. 1820, p. 171-2 ; 3 Term Reports, p. 693 ; 4 Term Rep. 1 ; 6 Term Rep. 499 ; 14 M. and W. 728 ; 1 L. R. Q. B. D. 192.

His Honour further called attention to an authority where the Judge had exercised the power of considering and dealing with a point arising during the trial which prevented a plaintiff from succeeding, although the Defendant had not taken it ; Law Reports, (1901) 2 K B 568, 575,

After dealing with these authorities, His Honour added that, without indicating any view he entertained, and as this was the first case of the kind, so far as he knew, that had ever come before the Court here, and without exercising the power referred to, he would prefer to have the whole matter fully argued upon the Statutes in force here, 16 Charles 2. c. 7 and 9 Anne, c. 14 ; and the authorities mentioned, and this could be done by a withdrawal of the record, if Counsel were not prepared to go on

at once, and if the Plaintiff desired to do so the action could be again brought forward for the purpose.

At the conclusion of His Honour's remarks, Counsel for the Plaintiff asked to be allowed to withdraw the record.

Counsel for Plaintiff. —*Solomon*.

Counsel for Defendant. —*Malcolm*.

George Francis Christie
vs.
William Branville North.

IN THE SUPREME COURT.

IN CHAMBERS.

IN THE MATTER OF THE WILL OF THE LATE CLARENCE HAMILTON BURNSIDE, DECEASED.

Will—Construction of—Specific future devise—Contingent devise of Realty—Interim Rents and Income—Residue—Guardians—Gift for specific purpose—Infant amply provided for in future—Mother not compelled to support meanwhile—Court may break in upon principal—Guardianship of Infants Act 1897.

1906

Testator devised to trustees in fee, in trust for his daughter upon her attaining the age of twenty-eight years and provided the trustees considered her behaviour, and present conduct worthy of the gift, certain freeholds.

There was no provision as to the disposition of the rentals during the interval. There were certain limitations over in connection with the devise, with an ultimate remainder.

Testator further devised unto the trustees the residue of his real and personal estate in trust (1) to rent realty (2) to convert personalty and with monies in hand invest in securities at interest.

Said rents and interest were to be used in payment of certain annuities.

Testator further directs that daughter's annuity is to be used by her Guardians for her education in England.

Held, that devise of realty in trust for daughter gives her a contingent estate to become vested on her attaining twenty-eight years and reaching the standard of worthiness required by the trustees.

Held further, that intermediate income therefrom, till the vesting of said property, falls within the residuary clause. That annuity to daughter is an absolute gift.

Held further, that Guardians are empowered to decide when education of daughter must commence and terminate. That annuity may be used for educational purposes until education in England commences.

SIR O. D. MALCOLM, C. J. The testator in this case made his will on the 21st day of January last, the day of his death.

He had given verbal instructions with regard to it a few days before, but his sudden illness prevented the completion of such instructions, and his Attorney was somewhat hurried in preparing it for execution.

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

Under the will two Executors and Trustees are appointed, Messrs. Frederick A. Burnside (a brother of the testator) and Mr. Harcourt G. Malcolm, a practising barrister here.

Three Guardians have also been named of the testator's two infant children Ellis Hamilton, and Freeda Georgina, aged respectively nine and sixteen years. The Guardians are his wife Ella Georgina Burnside; Frank Holmes the son of Dr. Holmes of this City; and the above-named Frederick A. Burnside.

After directing payment of his debts and funeral and testamentary expenses the testator has disposed of his estate and provided for its application in such a manner as to require the aid of the Court in determining the construction of the instrument in the particulars hereinafter dealt with.

Certain injunctions have been imposed upon his trustees as to the ultimate disposition of his estate which, however, do not call for the interference or assistance of the Court at present.

An Originating Summons was taken out by two of the Guardians, Mrs. Burnside and Mr. Holmes, on the 21st March last, and a Statement of Facts in support of it was filed on the 27th of that month.

These were not dealt with, however, and an amended Summons and Statement of Facts were issued and filed on the 12th April following, and it is upon these latter that the decision of the Court is asked for.

The parts of the will which are deemed material to this application are set out in the amended statement of facts and may be referred to as follows:

- (a) A gift to the wife and the two children, absolutely, of all of the testator's plate, linen, china and other household effects.
- (b) A gift to the daughter Freeda Georgina, absolutely, of two Policies of Insurance on the testator's life for \$1,500.
- (c) A devise to the trustees in fee, in trust for his daughter Freeda Georgina upon her attaining the age of

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

twenty-eight years and "provided the trustees consider her behaviour and present conduct worthy of the gift," of a lot of land in the City of Nassau particularly described; and which now yields a gross annual rental of £158.

There is nothing said in this devise as to the disposition of such rentals during the interval, and it is with respect to such rents that one of the questions has been raised on the Summons. There are certain limitations over in connection with this devise, with an ultimate remainder in case of the death of both of the children under 28 years, or of their forfeiting it by unworthiness.

(d) A devise unto the trustees of all the rest residue and remainder of his real and personal estate, in trust for the following purposes

1. to rent realty
2. to convert personalty and with monies in hand invest in securities at interest.

with directions that out of such rents and interest annually arising to pay to his wife £75 annually for life; to Freeda Georgina £125 annually; and to Ellis Hamilton £50 annually.

From the form of this residuary clause it might be supposed that the real estate devised in (c) was not included, but it is shown by the Statement of Facts (par. 6) that the only other real estate owned by the testator is a parcel of land at Eleuthera purchased for £16 10s. and which I take to be its value. The Court is asked to declare that the proper construction of this clause should include the realty in (c).

From the manner in which I have to deal with the intermediate rents of this last-named property it is not of much importance how this clause may be construed on this point.

The annuities to the children are unlimited in time, and it may be that hereafter some question may arise upon the one given to the daughter, for, according to the will, upon her attaining 28 years and being worthy of the gift, the trustees are directed to pay her £1500, but should she not be they are directed to invest such sum and pay her the interest, presumably for life.

Nothing is said as to the annuity ceasing or continuing after the attainment of twenty-eight years.

The testator goes on to deal with her annuity by directing that it shall be used by her Guardians for her education in England, and in case of its insufficiency for that purpose charged the surplus (if any) of the income produced under the residuary clause with payment of the deficit. Charging this surplus is intelligible; but there follows a charge upon the £1500 which it is difficult to understand, for it must be recollected that that gift is only provided for after she has reached twenty-eight years, and when ordinarily her education would be completed.

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

There is no disposition of the £1500 in case of the death of the daughter if it be invested upon the contingency named.

The bequest of the £1500 only comes into effect on the daughter attaining twenty-eight years and showing herself entitled—between twenty-one and twenty-eight there seems nothing to prevent her claiming and receiving the annuity of £125 without the intervention of her Guardians.

I have referred to the possibilities that may arise to show the complex character of this will in the respects pointed out; but they do not interfere with or affect the points submitted for decision.

There are other circumstances set out in the Statement of Facts to which there is no necessity to refer.

The Originating Summons has been taken out by two of the Guardians as already stated, Mrs. Burnside and Mr. Holmes; the parties summoned being Mr. F. A. Burnside and Mr. H. G. Malcolm as Executors, and Mr. Burnside as a Guardian.

Counsel appearing for the Executors submitted that one of the Executors held one view on the matter, and the other a different one. He offered these views without advancing his opinion on either, and cited the authorities bearing upon the points without urging arguments for or against.

The questions set out in the Originating Summons are numerous and important and demanded from me a careful examination of the principles of law and equity to be applied to the will and of the many authorities cited in argument.

Before entering upon these questions I will deal with one or two of the bequests and state the effect of them.

The gift of the plate, linen, china, and household effects is an absolute one vesting the property in the legatees.

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

The bequest of the policies of insurance to the daughter Freeda Georgina is also an absolute gift to her, and when the monies due under them have been collected by the Executors they should pay them to her Guardians who should invest in safe securities and expend the interest for her benefit.

The devise to the Trustees of the real estate in the City of Nassau in trust for the daughter has been already referred to as (c).

This devise gives the daughter a contingent estate to become vested on her attaining twenty-eight years and reaching the standard of worthiness required by the Trustees.

The principal question arising on this devise is as to the application of the intermediate rents from the property from the date of the testator's death to the time when the daughter reaches twenty-eight; when the property will become vested in her.

Both Counsel were agreed upon the rule in such cases laid down in Jarman on Wills Edn. p. 651, that where a specific devise is to take effect *in future*, so that at the death of the testator there is no person actually entitled to the intermediate income the rents and profits will, until the devise vests in possession, pass under the residuary clause (if any) but where there is no such clause they will descend to the heir.

The authorities in support of this position are principally. *Holmes v. Prescott*, 33 L. J. Ch. 264, *in re Eddels Trusts*, 11 L. R. Eq. 559; *In re Mowlem* 18 L. R. Eq. 91.

Wade Gery vs. Handley 1 L. R. C. D. 653; *Guthrie vs. Walrond* 22 C. D. 593, *Bective v. Hodgson* 33 L. J. Ch. 489.

Now, in the will before me the rents of the real estate specifically devised to the daughter remain undisposed of, and therefore on the principle adopted in the foregoing authorities those rents fall into the residuary clause of the will to be dealt with as directed by such clause.

The chief interest in this Summons centres around the annuity of £125 to the daughter.

This annuity is given directly to her and the Trustees are directed to pay it annually. Being an infant they would not be prepared to do so to her personally, certainly not before she reaches the age of 21 as she could not given them a legal dis-

charge but that has been obviated by the testator who has named Guardians for his children and in this particular annuity he has clearly intimated that it is to be received by them as he directs them to apply it to a particular purpose.

A number of cases have been brought under my notice bearing upon the points, whether the gift of this annuity is an absolute one, as to whom it should be paid, and how the parties receiving it should apply it.

While they may not be specially applicable to the present matter on all of these points they go to show the strong inclination of the Courts to advance the interests of infants.

The first I take is Prescott vs. Goodman 29 L. J. P. 118 where a testator directed the residue of his estate to be invested and authorized his Executors to devote the same to the education of his sister's children—at the time of his death all of the children were beyond educational age—they claimed to be entitled to this residue and the Court admitted the claim.

Barton v. Cook, was also cited, 5 Vesey 461—in which a legacy was given for the board and education of the legatee and another for an apprentice fee for him—upon reaching the age of 19, and without being apprenticed, upon proceedings in connection with the estate being taken, the monies were ordered to be paid to the legatee. Wilkins vs. Godrell 13 C. J. 564 was a case in which a legacy was given to a woman to be continued at her death for maintenance and education of her children. After her death upon application made the Court held that the children were entitled jointly for their lives.

In Mills v. Johnston (1894) 3 C. D. 204 a testator gave certain sums to his sons upon their attaining 21 to be applied as his trustees might direct on reaching that age upon their applying for payment the Court ordered the monies to be paid to them freed from the exercise of any discretion on the part of the trustees. Following these comes the case of Williams vs. Patworth, (1900) A. C. 563 which endorses the principle laid down in Wilkins vs. Godrell.

It would appear that the testator Burnside was not inclined to place the burden of Guardianship on both of his Executors. He selects one of them, his brother, and names his wife, an appropriate person for had he not done so she could have claimed the position under "the Guardianship of Infants Act 1897"; and a friend Mr. F. Holmes. He must have had confi-

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

dence in each of them, and a full belief in the exercise by them of the faithful discharge of the important duties attaching to such a responsible office.

As matters now stand I find that the infant Freeda Georgina has real estate which is now yielding about £18 per annum gross, an uncertain source of income I consider which may be reduced from time to time by various circumstances.

She has also the proceeds of two policies of insurance (£300) these when invested may produce £18 per annum. The desire of the testator was that the annuity of £125 should be expended on her education in England. He makes no mention when such education shall commence or end, nor does he say what is to be expended for her in the interval of time between his death and her leaving for England.

These matters he leaves to the discretion of her Guardians. They, without exercising any, come to the Court and ask for its advice.

It cannot be supposed that he intended her to be without maintenance, education and support during this interval; nor that she should be supported by her mother. In the latter case he would have said so in his will as that instrument discloses the keen interest he had in the advancement of his child. Provision on this point was simply forgotten.

In the face of this infant being so amply provided for the mother cannot be required or compelled to maintain her.

There is authority for this in the case of *Douglas v. Andrews* 19 L. J. Ch. 99 which is cited in *Eversley's Domestic Relations* at p. 637 in support of the position that although a father or mother is alive with means an infant may be maintained out of his own property. There are several modern cases on this point.

It was mentioned on the hearing that one of the trustees held the view that no part of the annuity should be applied towards the maintenance of the infant before she went to England, but that the rental from her land, and the proceeds from the policies should be devoted to the purpose.

I am not inclined to accede to this as I consider it would be more advantageous to the infant that the insurance monies should be invested and the principal remain for her future benefit—and I therefore deal with the annuity as hereafter set forth

which will allow the insurance monies to remain intact when the time arrives for the infant to go to England.

The Guardians should agree on an amount which may be considered sufficient to maintain educate and support her from the time of the testator's death until they decide to send her to England they should use the rents from her land and the interest arising from the policies and supplement these sources from the annuity to such an extent as will make up the amount decided upon.

The expenditure should be according to the requirements and conditions of a child in her station of life, possessed of a fixed income, and should be so regulated that at the expiration of what I may term the probationary period there will exist a fund from the annual surpluses which will meet the expenses that will be connected with placing the infant at a proper school.

It might be on a graduating scale commencing with £50 per annum and advancing, if necessary, each year by such a sum as her increasing wants and requirements demand.

I order and declare as follows :

That the real estate devised in trust for the infant daughter Freeda Georgina is embraced within the residuary clause of the testator's will.

That the intermediate rents arising therefrom between the death of the testator and the vesting of such property in the said infant fall within the residuary clause of the will.

That the annuity of £125 bequeathed to the infant Freeda Georgina is an absolute gift payable from the death of the testator, and should be paid to her Guardians.

That the Guardians are clothed with power to decide when the education in England shall commence and how long it shall continue, regard being had to the rights of the infant upon attaining 21 years.

That the said Guardians may use and apply so much of the annuity for the proper maintenance education and support of the infant until she leaves for England to be educated as, added to the rents from her real estate, and the interest from the proceeds of the policies of insurance received by them may be necessary for the purpose.

In the matter of the Will of the late Clarence Hamilton Burnside, deceased.

In the mat-
ter of the
Will of the
late Clarence
Hamilton
Burnside,
deceased.

That the annuity will continue to be payable to the Guardians, notwithstanding the infant has completed her education, until she reaches the age of 21 unless any other order may be made hereafter.

Upon attaining that age application may be made to the Court for further orders in the matter.

That any surplus remaining in the fund created by the residuary clause should remain untouched, so that it may be ready at any time to meet the charge imposed upon it by the testator in case of the insufficiency of the annuity to complete the infant's education.

That the Trustees should so keep their accounts, that it can be readily ascertained what are the relative proportions of rentals and interests from investments forming the fund from which the annuities are paid.

That the costs be paid out of the Estate.

Liberty to apply.

Counsel for the Guardians :—*Solomon*.

Counsel for the Trustees and Executors :—*Bertram*—*At-
torney-General*.

ADMIRALTY SIDE

JOHN HENRY SMILEY, WRECKMASTER AND OTHERS
 AGAINST THE AMERICAN SCHOONER "JOHN D.
 COLWELL" HER CARGO AND FREIGHT RECENT-
 LY STRANDED ON EGG ISLAND REEF.

Salvage—Validity of Agreement—Power of Master to bind owner
—The Licensed Vessels Act, 1858.

1906

July.

On Saturday, the 7th July 1906, just before sunset, the American Schooner "John D. Colwell" ran ashore on Egg Island Reef. The schooner "W. H. Albury" was in this vicinity at the time and immediately went to her assistance. On getting alongside both Captain Russell of the William H. Albury and a passenger named John H. Smiley—also a nautical man—offered their services to Captain Blake of the wreck, but they were not accepted. Two attempts were made by the Captain of the stranded schooner to get her off, one at high tide on the night she went ashore and the other next morning when the tide was full. They both proved unsuccessful, the hauling line parting on the second occasion. On Sunday morning Captain Blake sent for Smiley and after some discussion as to the amount to be paid, Smiley agreed to take the vessel off and put her in safety for \$4,000. Captain Blake thereupon called his officers into the cabin to witness the agreement. In the meantime quite a number of salvors—about three hundred—had arrived at the wreck, and immediately the agreement was arranged they commenced to discharge the cargo. The vessel was loaded with ice. The salvors worked from 9.30 a. m. to 6.30 p.m. and jettisoned over two hundred tons of ice. They also took up the anchors, the lines from which had parted that morning, and ran them out again. At 6.30 the salvors—with the exception of the captains of the salving vessels—were sent off, and after heaving at intervals with the ship's steam donkey for about 2 hours the schooner was floated and next day taken to Nassau. On reaching Nassau the agreement was confirmed by the Captain after consultation with the underwriters' agent, but some days later, on the representative of the owners of the stranded vessel reaching Nassau, it was repudiated and this action commenced.

The hearing lasted four days. At the close of the plaintiffs' case, at the request of counsel for the defence, the plaintiffs'

John Henry
Smiley,
Wreckmaster
and others
against the
American
Schooner
"John D.
Colwell" her
cargo and
freight re-
cently
stranded on
Egg Island
Reef.

counsel stated that his claim was based on the agreement made on the reef and confirmed in Nassau by the captain. If the agreement was not valid then he claimed for ordinary salvage services.

For the defendants it was urged,
That

1. Whether the agreement was voluntary or not it was made on the reef and the defendants were entitled to repudiate it, both on general principles, and under our own statute law. Further that the agreement was not with a master or other person belonging to a licensed vessel.
2. As to the alleged agreement in Nassau the Captain was not legally entitled to bind his owners by it, as he did not communicate with them as he should have.
3. That in no event could an agreement for salvage services already performed fall within the general power of a master to bind his owners for necessities for the prosecution of the voyage.
4. That this was an ordinary case of salvage and the amount claimed was exorbitant and excessive in view of the services rendered.

On behalf of the plaintiffs Mr. Solomon argued.

1. That the Bahamas Licensed Vessels Act had nothing to do with the case as none of the vessels or persons engaged in the salvaging operations were licensed.
2. That an agreement is prima facie binding. That this one was voluntary, there was no compulsion, no unfair advantage was taken of the captain's ignorance, and after ample time to consider the terms a distinct bargain was definitely concluded.
3. If the agreement was not valid the salvage services rendered were meritorious and well worth the amount claimed.

His Honour delivered an oral judgment declaring the agreement not binding, the amount claimed exorbitant and awarded the salvors the sum of £375, with costs.

Counsel for Plaintiffs.—*Solomon*.

Counsel for Defendants.—*Malcolm*.

COMMON LAW SIDE.

JENIMA MALCOLM, ALICE ALDAY MALCOLM, ALFRED
ALDAY MALCOLM, MADELINE MAUD MALCOLM,
KIRKWOOD GRAHAM MALCOLM *vs.* ETHEL
AGNES MOSS AND ISAIAH SWEETING.

*Practice—Costs—Discretion of Court over—Trial by Jury—Plaintiff
successful on material point at issue.*

1906

November.

The matter in dispute in this case was one of fact entirely.

The Jury found for the plaintiffs against the defendant Ethel Agnes Moss and gave 1s. damages. They found for the defendant Isaiah Sweeting on his counter-claim against the plaintiffs and gave 1s. damages.

On motion of Mr. Solomon the Court ordered that judgment be entered for the defendant Isaiah Sweeting for one shilling damages and costs, but declined to allow the pleadings to be amended so as to claim a declaration, informing him that the findings of the jury might be recited in the judgment.

The Acting Attorney General then moved for judgment for the plaintiffs against the defendant Ethel Agnes Moss with costs. Whereupon Mr. Callender moved for judgment for the defendant Ethel Agnes Moss against the plaintiffs with costs. After lengthy argument on both sides, His Honour on the authority of *Foster v. Farquhar* L.R. (1893) 1 Q.B. p. 564 (cited by the defendant's counsel) and the local case of *Brace v. Menendez*, ordered that judgment be entered for the plaintiffs against Ethel Agnes Moss without costs.

On motion of counsel for the plaintiffs a stay of execution was granted pending the application for a new trial.

Counsel for plaintiffs—*Malcolm, Acting Attorney General.*

Counsel for defendant Ethel Agnes Moss—*Callender.*

Counsel for defendant Isaiah Sweeting—*Solomon.*

COMMON LAW SIDE.

JEMIMA MALCOLM, ALICE ALDAY MALCOLM, ALFRED
ALDAY MALCOLM, MADELINE MAUD MALCOLM,
KIRKWOOD GRAHAM MALCOLM vs. ETHEL
AGNES MOSS AND ISAIAH SWEETING.

1906

*Practice—New Trial—Verdict against evidence—Of Jury properly
found must stand—Principle on which New Trial allowed.*

A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of evidence, unless the verdict was perverse, or such as twelve men, viewing the whole of the evidence reasonably, could not properly find.

Where there is evidence on both sides properly submitted to the jury, and the judge who tried the case expresses no disapproval, the verdict of the jury once found ought to stand.

JAMES M. RAE, ACTING C. J. This is an application in behalf of the Plaintiffs for a new trial, in so far as relates to the issues between the Plaintiffs and the Defendant Isaiah Sweeting, on the ground that the verdict for the defendant Sweeting is against the weight of evidence.

The action, in which the Plaintiffs claimed £200 for alleged trespasses by the Defendants on their land, was tried during the past month before the then Acting Chief Justice the Honble. Anton Bertram and a Special Jury. The defendants who defended separately, pleaded that the land was not the plaintiffs and thus the question of title was put in issue. The defendant Sweeting also counter claimed.

The parties are the respective owners of adjoining lots of land in the vicinity of the Village and Wolf Roads in this Island, which form part of a tract of 420 acres originally granted by the Crown to Luke A. Chilcott in the year 1788, a part of which was subsequently divided into 20 lots. The question at issue was whether the defendants who had only recently acquired their land, had encroached upon the Plaintiffs' land, which it was claimed had been in the uninterrupted possession of the Malcolm family for a great number of years.

The Jury found that the defendant Moss had trespassed on the Plaintiffs' lots and they gave one shilling damages. On

the counter claim by Sweeting, they found that the Plaintiffs had trespassed against him and they gave one shilling damages.

The land was what is known locally as "bush." It was covered with a low indigenous growth, and for the most part had never been cultivated. Recently there had been what was facetiously described by the Plaintiffs' Counsel as "a peaceful invasion from Eleuthera." The defendant Moss who was from that Island, purchased two of the twenty lots, and in turn, sold a portion of his land to the defendant Sweeting; and the two commenced to cultivate their respective lands, which had until then remained untouched.

Their title was traced to one Andrew Seton who had purchased in 1800.

The trial occupied three entire days. A view of the lands was had by the Jury, accompanied by the Chief Justice and the counsel for the respective parties, as also by the Surveyor General who was a witness in the case. Evidence was given by both sides and included much of a documentary character.

At the conclusion of the evidence on the third day, the Chief Justice informed the learned counsel engaged, of the points on which he desired that they should address the Jury; and in his summing up he submitted to the Jury certain specific questions to which he desired their answers. No objection was offered to the course pursued.

These questions and answers were as follows:

1. Did the conveyance of April 15th 1800 to Andrew Seton include the disputed slip?

Yes.

2. Did the conveyance of April 15th 1800 to Bernard Fourment include the disputed slip?

No.

3. Independently of any conveyance, have the Plaintiffs or their predecessors in title or both combined, by twenty years uninterrupted exclusive occupation acquired the disputed strip or any part thereof?

No.

4. Apart from any question as to the original conveyance, or any question of continuous occupation, were the Plain-

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tiffs in actual occupation of the disputed strip at the time of the acts complained of?

No.

5. Apart from any question as to the original conveyance, was the defendant Isaiah Sweeting in actual occupation of the disputed strip at the time of the acts complained of?

(I explained to the Jury that in considering these last two questions, as also the question last but two, they should take into consideration the nature of the land referred to, and the use that any owner of such land would be likely to make of it while in that condition.)

Yes.

6. Was the lot conveyed by Bernard Fourment to William Wade Rigby, by intermediate conveyance now lost, conveyed to James Malcolm?

We do not know.

7. Did Martha Eve Almy acquire an equitable interest under Andrew Seton's Will in the four lots granted to Andrew Seton by John Miller?

(I explained to the Jury that the point to which this question was directed was this—Did Seton die still possessed of the lots? And I told them that a man who was proved to have acquired property during his life, might be presumed still to have it at his death unless evidence was given to show that he had parted with it.)

Yes.

8. Has that interest been purchased by the defendants and is it still intact?

(I explained that by the last part of the question I mean, had the extent of the interest been derogated from by adverse occupation of any part of the land)

8. Yes.

There was no question of law involved, the matter in dispute being one of fact entirely. It was therefore pre-eminently a case for a jury and it was decided by the verdict of a special jury composed of twelve intelligent and competent citizens.

The Court is now asked to set aside their verdict and to grant a new trial in so far as relates to the defendant Sweeting, as above set forth.

It is a well established principle that the verdict of a jury should not be lightly set aside. The jurors are the constitutional judges on questions of fact, and in the language of Lord Herschell L. C. in the case of "*The Metropolitan Railway Company vs. Wright*" (11 Appeal Cases—House of Lords—p. 154) "the verdict ought not to be disturbed unless it was one which a jury viewing the whole of the evidence reasonably, could not properly find."

In the same case, the Earl of Selbourne L. C. had said, in delivering a judgment of the Court of Appeal, reversing a decision of the Divisional Court ordering a new trial on the ground that the verdict was against the weight of evidence;

"We all think that there are not sufficient grounds for a new trial in this case. As the verdict was not perverse or unreasonable looking to the evidence given, it does not seem to us to be a case in which the decision of the jury, who are the proper judges of such questions, should be interfered with * * * *
"There must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable and almost perverse that the jury when instructed and assisted properly by the judge, should return such a verdict."

In "*Commissioner for Railways—and—Brown*" (13 App. cases p 134) Lord Fitzgerald said, in delivering the judgment of the Privy Council reversing an order of the Supreme Court of New South Wales, setting aside a verdict and granting a new trial—Chief Justice Tindal, about fifty years since, laid down as a rule to this effect: that where the question is one of fact and there is evidence on both sides properly submitted to the jury, the verdict of the jury once found ought to stand; and that the setting aside of such a verdict should be of rare and exceptional occurrence. Their Lordships are not aware that the rule thus laid down has been abandoned.

In *Philips—and—Marti* (15 App. Cases p. 193) and in *Australian Newspaper Company Ltd.—and—Bennett* (App. cases 1894 p. 284), both of which were appeals from orders of the Supreme Court of New South Wales granting new trials the Judicial Committee of the Privy Council followed the rule in the before mentioned cases and reversed the orders.

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In *Aitkin vs. McMeckan*—Australia—(App. Cases 1895 p. 310) and *Clouston & Co. vs. Corry*—New Zealand—App. Cases 1906 p. 122) cited by the Acting Attorney General in support of his motion, there were special circumstances which determined the judicial Committee of the Privy Council to advise His Majesty to allow new trials on the appeals.

In the present case there were no special circumstances. Can it be said that the finding of the jury was "perverse," or such as twelve men "viewing the whole of the evidence reasonably, could not properly find?" There was evidence on both sides properly submitted." No doubt it was conflicting, but the questions submitted by the learned Chief Justice to the jury for their consideration went directly to the point at issue, and were clearly and unequivocally answered. The Chief Justice did not express disapproval of the answers, from which it may be inferred that they met with his approval. Be this as it may, after a careful perusal of the judge's minutes, it does not appear to me that the verdict should be disturbed, and the motion is therefore dismissed.

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*Practice—Leave to Appeal—Question of Fact—Public Importance—
Supreme Court Act 1896—(Bahamas Act 59 Vic. c. 26.)*

Leave to appeal ought not to be granted save where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character.

JAMES M. RAE, ACTING C. J. This is an application in behalf of the plaintiffs for leave to appeal to His Majesty the King in Council from the judgment for the defendant Isaiah Sweeting against the plaintiffs.

The action was brought in this Court to recover £200 for an alleged trespass by the defendants on the Plaintiffs' land situate near the Village Road in this Island. The defendant Sweeting in addition to denying the plaintiffs' title, counter claimed. The verdict of the jury was in his favour and he was awarded by them one shilling damages. The trial which occupied three days, was before the then Acting Chief Justice—the Honble Anton Bertram—and a Special Jury:

The application is under Section XLI of the Supreme Court Act 1896 which is as follows:

XLI. "When in a civil action a final judgment or order is given or made by the Court determining any claim or question wherein the amount sought to be recovered, or the value of the property in dispute is of the amount of five hundred pounds or upwards; and where the amount sought to be recovered, or the value of the property in dispute is less than five hundred pounds, then, by leave of the Court, the party aggrieved thereby may appeal to Her Majesty in Council."

The amount sought to be recovered, as well as the property in dispute in this case being less than £500 the leave of the Court is necessary to enable the plaintiffs to prosecute an appeal, and the granting of such leave is in the discretion of the Court.

This being the first application of the kind in the Colony, there is no local precedent to help the Court, and it must therefore

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turn for guidance to the principles which have been laid down by the Privy Council in granting or refusing leave, in cases wherein special leave to appeal has been petitioned for by suitors in other Colonial Courts in which no right of appeal existed, either in consequence of the sum being under the appealable amount, or otherwise.

These clearly indicate that such leave will only be granted "where the case is of gravity, involving matter of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance, or of a very substantial character. Such were the grounds enumerated in *Prince v. Gagnon* (8 Appeal Cases p. 103) which was a petition for special leave to appeal from a judgment of the Supreme Court of Canada reversing a judgment of the Court of Queen's Bench, the value of the subject matter being £1000 and there being no right of appeal from the Supreme Court saving any which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative."

In re-Charles Harvey—Jamaica—(III Moore's P. C. Cases p. 149) leave to appeal was refused, the sum being under the appealable amount.

In re-Sherum—Van Diemens' Land (IV Moore's P. C. Cases p. 149) leave to appeal from the Supreme Court was refused, the question being one of fact only.

In Canada Central Railway Co. and Murray and others (8 Appeal Cases p. 574) leave was refused on the same ground as in the case above cited.

In Daily Telegraph Newspaper Company v. McLanglilan—Australia—(Appeal Cases 1904 p. 776) Lord Macnaghten in delivering the judgment of the Privy Council observed "Now the petitioners, as their Lordships understand, do not propose to contest the finding of the High Court on the question of fact, nor indeed would their Lordships be disposed to advise His Majesty to admit an appeal on such a question.

In Lindo v. Barnett (IX Moore's P. C. Cases p. 456) the Supreme Court of Jamaica sanctioned an appeal to the Privy Council although the subject in dispute was under the appealable value, the question involved being one of importance to the whole community, and the judicial committee allowed the appeal.

So in *Le Meunier vs. Le Meunier and others* (App. Cases 1894 p. 283) special leave to appeal was granted against a decree of the Supreme Court of Ceylon, as appears by their Lordships' judgment, "under all the circumstances of this somewhat exceptional case."

The following cases cited by the Attorney General in support of the Plaintiffs' application do not appear to be relevant :—

Frith vs. Frith (App. Cases 1906 p. 254). In this case there had been an appeal from a decision of the Supreme Court of Turks Islands to the Court of Error of that Dependency. The latter held that "the proper steps had not been taken to bring the Appeal before them; that the Appeal was not properly before them at all; and they dismissed it with costs. The Appellant obtained leave to appeal to the Privy Council in the usual way." Their Lordships thought that "the proceedings of the Court of Error appeared to have been somewhat irregular, and special leave was given to the Appellant to appeal from the decision of the Supreme Court direct to His Majesty in Council, in addition to the leave to appeal obtained by him from the Court of Error itself."

There were several questions of law involved in the case.

In *Aitken vs. McMeckan* (App. Cases 1895 p. 310) the issue was the capacity of a testator. The Court of Appeal of Victoria had dismissed a motion for a new trial. The trial Judge (the Chief Justice) stated that "he was not satisfied with the verdict, and that in his opinion it was wrong." The Privy Council reversed the order of the Court of Appeal and granted a new trial, their Lordships expressing the opinion that the disproportionate amount of attention given to the Medical evidence, which bore rather on the probable capacity of the testator than on his actual capacity as exhibited in action, being calculated to divert the attention of the Jury from the real issue."

In *Clouston vs. Corry*—Australia—(App. Cases 1906 p. 122) the Chief Justice before whom the action was tried expressed the opinion that the verdict was unsatisfactory, and that his direction at the trial was wrong. The Court of Appeal of Victoria dismissed a motion for a new trial, and the Privy Council reversed the order and granted the new trial asked for.

In the present case the sum claimed as damages was only £200—from both defendants, and the value of the land itself is very small.

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There is no question of law involved the issue being one entirely of fact.

It is of no public importance. Applying to it the principles defined in the foregoing cases, it does not appear to me to be a proper case in which to grant leave to appeal, and the motion is consequently dismissed.

Should the Plaintiffs yet entertain the desire to make the case the subject of proceedings before His Majesty in Council, they have opened to them the privilege of petitioning for special leave to appeal.

Counsel for Plaintiffs.—*Malcolm, Acting Attorney General*

Counsel for Defendant.—*Isaiah Sweeting.—Solomon.*

On Friday December 21st an application was made to His Honour the Chief Justice for leave to appeal to His Majesty the King in Council against the decision of the Acting Chief Justice Rae refusing to grant the Plaintiffs in the above action a new trial.

After hearing argument on both sides His Honour dismissed the application with costs and refused to give the leave to appeal asked for.

SUMMARY SIDE.

GEORGE THOMAS GRAHAM vs. MARY ANN GLINTON.

Ejectment—Married Woman—Marriage before M. W's P. Act—Property acquired before Act—Whether should be presumed separate estate—Married Woman's Property Act 1882 (Bahamas Act 1884.)

1901

Certain land is conveyed to plaintiff by A. B. his grand aunt.

A. B. was married and said land was acquired by her before the passing of the Married Woman's Property Act 1882.

The document under which A. B. claims to have acquired the land is not produced and there is no satisfactory evidence of its nature and contents.

Held, that the Court cannot in the circumstances presume that the property was held by A. B. to her "sole use" and that the deed from A. B. to the plaintiff should have been executed by her husband and acknowledged by her.

SIR O. D. MALCOLM, C. J. The Plaintiff in this action seeks to recover possession of a lot of land dwelling house and shop situate in Hospital Lane in this Island now in the possession of the Defendant.

In support of his right to these premises he produces a conveyance of them from one Jane Hall to himself dated 18th February 1901. He proves that the grantor was his grand aunt, and in consideration of his support of her and her husband Isaac Hall, who is still alive, she expressed a wish to give him the property which she afterwards did by this deed, but that he paid her the consideration of £10 mentioned in it upon its execution.

Her husband has not executed the deed. The Plaintiff desired to have him do so, but the grantor claiming the land to be hers and stating that her husband had nothing to do with it, the Plaintiff appears to have been satisfied and the deed was made in her name and executed by her alone.

The proof of Jane Hall's right to the land and its mode of acquisition by her are given by the Plaintiff's father and other witnesses. The father Anthony Graham states that he is a grand son of one Alexander Graham (who died before 1866) who was the father of Jane Hall, and that when a boy of 12 or 14

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years of age he saw his grandfather give Jane Hall an envelope which he (the witness) believed was a title deed, and heard him say to her "Here Jane this is yours, I give John his own already." He goes on to say that his Aunt (Jane Hall) married one Alex. Forbes by whom she had several children the Defendant being one of them. Many years after, he saw a paper brought to a meeting of a Sharing Society by his Aunt for the purpose of borrowing money upon it, which was read by an Uncle of his and which he (the witness) understood to be a deed giving the property now claimed to his Aunt Jane. At the time of the borrowing he alleges that Alex. Forbes the husband of Jane was dead. He fixes the date of borrowing at about 35 years ago (1866?)

He goes on to state that Jane Hall occupied this land until her husband died, when she went to Abaco and made several voyages from and to there until she married there her surviving husband Isaac Hall.

She had placed one of her children named Alex. Forbes in possession of the land who remained on it until 1899 when he went into the Asylum where he died.

The paper referred to has not been produced and its non-production is accounted for by reason of its alleged loss which the witness says his Aunt informed him happened on one of her voyages from or to Abaco. This statement of hers was made about 11 years ago, but the date of the loss is not given. In fact the evidence of this witness with regard to dates particularly is not satisfactory, it was evidently guesswork as for instance he fixes the delivery of the envelope at about 1855, the marriage to Forbes in 1858, the production of the paper at the Sharing Society Meeting about 1866 when he stated her husband was dead, and then alleges that his Aunt lived with Forbes, presumably after their marriage, for 35 years on this land. This latter would be impossible, for supposing the marriage took place in 1858—35 years to that would bring us to 1893, and we find by the evidence of the Plaintiff, that his Aunt was living with her husband Isaac Hall in 1890 when he the Plaintiff first went to Abaco, and by the admission made by the Plaintiff's Counsel hereafter mentioned that her marriage to Hall took place in 1874.

The Plaintiff also swore that his Aunt told him about 11 years ago, that the paper was lost. While he and his father, speak of this paper as a deed another witness Samuel J. Franks,

who witnessed the conveyance to the Plaintiff, swears that she told him that her father had left this land to her by his Will.

Other evidence in the case showed that Jane Hall occupied this property continuously from the time she first obtained possession, either herself or by her agent, up to 1899.

So whether by deed, will, or occupation her right to the possession up to the time of her execution of the conveyance to the Plaintiff was clear and if no other point had arisen the Plaintiff would have been entitled to judgment.

Objection was taken to the admissibility of much of the evidence respecting statements made by Jane Hall which I should probably have sustained had it been necessary to do so.

But a question has been raised which goes to the root of the case, and as the objection taken to the admissibility of the evidence referred to cannot affect the question raised, I shall pass over those objections and deal with the main question.

At the close of the Plaintiff's case Counsel for Defendant took a preliminary objection and contended:—

That it being shown by the evidence that Jane Hall was a married woman when she executed the deed to the Plaintiff such deed was invalid and no property could pass thereby to the Plaintiff unless it was proved that she was married to Isaac Hall after the commencement of the Married Women's Property Act (1st January 1885); or that her title to the land accrued after that date.

He cited.

Secs. 2, 5 of the Act.

Smith's Married Women's Property Act 1882, pp. 13. 15.
Williams Real Property 283, 5.

The point was met by the Plaintiff's Counsel who set up and argued three others:—

1. That it was for the Defendant to show that Jane Hall was married prior to the 1st January 1885, and not the Plaintiff.

This was abandoned at a subsequent meeting of the Court when Plaintiff's Counsel made the following admission:—

"I am bound by the evidence of Israel Jones one of my witnesses which places the marriage of Jane Hall to her hus-

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“band Isaac Hall in the year 1874. I accept that as the date of
“her marriage.”

This admission together with the evidence that the deceased Jane Hall was possessed of this property long prior to her marriage bring the case within the authorities cited by Defendant's Counsel, and it must be determined upon the other points set up by the Plaintiff's Counsel.

The next is :

2. That it was for the Court to decide upon the evidence whether Jane Hall did not hold the property conveyed as her separate estate and to presume upon such evidence that the paper from her father was drawn by a lawyer and contained a limitation of such property to her separate use.

3. That the equities of the case were with the Plaintiff.

Later on at a subsequent meeting of the Court he further submitted,

4. That assuming that Isaac Hall never received any of the rents and profits of the land (which he was prepared to prove) the Court would be justified in presuming that it was the wife's separate property.

Upon point 2 the case of Taylor v. Meads was cited (34 L. J. Ch. 203) which lays down the principle that a married woman has a power of disposition apart from her husband over property settled to her separate use. In that case I may say it was shown that the property conveyed had been settled to her separate use, and the Court was not required to presume it as is asked in this case. Taylor vs. Meads is therefore no authority on the question of presumption.

From the evidence before me it is not possible to say whether the paper sworn to was a deed or a will, but the fact that Jane Hall had undisturbed possession of this land for the long period sworn to would lead to the presumption of a lost grant, and upon that presumption it would be for the Court to decide whether the further presumption would arise that it contained the limitation contended for by Plaintiff's Counsel. To enable the Court to decide that property is held to the separate use of a married woman there must be evidence to show that such is the case, or from which it can be clearly inferred.

It is laid down in Story's Eq. Jur. p. 949 that the settlement of property in such a manner must clearly appear beyond

any reasonable doubt to exclude the ordinary legal and marital rights of the husband.

At p. 13 of Smith's Married Women Property Act 1882 it is thus referred to :

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"In order that property belonging to a woman may on her marriage be deemed her separate estate in equity it is requisite that equity should be able to discern either from the terms of the instrument through which she receives the property or from the nature of the transaction by which she acquires it an intention that she should have the sole use thereof.

" * * * * *

"In by far the greater number of cases in which a wife enjoys a separate estate this intention is expressed in some instruments of limitation such as a will, deed of gift, or marriage settlement, and no particular form of words is necessary to give effect to it provided only that it is clear."

Further on at p. 15 in this same work dealing with the interpretation of the words "sole use" it is stated : "If in case these words are used and the property is at the same time vested in trustees it seems that they will be sufficient to create a separate estate," but it is added, "if the gift is to a widow or to a woman unmarried not made in contemplation of marriage and without the interposition of trustees it has been held by the highest authority that the words "sole use and benefit" will not import exclusion of a future husband and will not suffice to impress on the property the character of separate estate."

It is then laid down on the same page. "In all these cases the question as to the intention to exclude the husband's legal claim has turned on the construction of the expressions used by conveyancers, in other cases the nature of the transaction has sufficed to induce the same effect—"

I have given these quotations in full to show how careful the Courts are in dealing with matters of this kind.

It will be seen from the authorities cited in Smith that the decisions on the point are mainly based on deeds given in evidence, and the Courts have interpreted the effect of words used in them. I am asked to decide that a deed, presumed to have existed and not produced, and without evidence of the nature of the transaction connected with it, contained words limiting the property in it to the separate use of the grantee.

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The only authorities that I am aware of where a Court is asked to presume certain positions are where a document is produced and its language is not clear or evidence given of a transaction and which may admit of the construction asked to be placed upon it.

Now what is the evidence in this case upon which the Plaintiff's Counsel asks me to decide that the paper sworn to by Anthony Graham and which may be presumed to be a lost grant was drawn by a lawyer and contained a limitation of the property to the separate use of Jane Hall.

All that is sworn to is that an envelope is given to her while unmarried by her father accompanied by the statement already mentioned, that a paper is subsequently submitted to a Sharing Society which Anthony Graham, who cannot read or write, hearing read understood to be a deed giving this property to Jane Hall. Then there is a statement alleged to have been made by Jane Hall, when about 80 years old that it was her separate property and her husband had nothing to do with it, and further that she had obtained the property under the will of her father.

There is nothing definite or clear in such evidence to enable me to decide that this property was held as her separate property or to presume that it was so limited.

The description of the paper given by Anthony Graham would lead to the belief that, if it existed at all, it was an ordinary deed of gift or conveyance.

The statements of Jane Hall convey to my mind nothing more but that she deemed the land to be her separate property because it had been given to her before marriage and do not raise the presumption that it was limited to her separate use according to the rules of conveyancing and equity of which a person, like her, unable to read or write, would not or could not understand.

The only authorities brought forward by the Plaintiff's Counsel to support his contention on the point raised were :—

1st. The maxim "Omnia praesumuntur rite acta."

and

2nd. Williams vs. Eyton, 27 L. J. Ex. 176 and he mentioned he could find no others.

Stated shortly the case of Williams vs. Eyton was one for trespass the Defendant pleaded a right of way and the evidence showed that a statute had been passed directing the enclosure of certain waste land which included the locus in quo in the action and the setting out of roads and requiring the authorities empowered to close to act in the matter subject to an order of certain Justices.

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It was proved that the enclosure had taken place and an award made upon the matter; and that a certificate had been signed by Justices as to the fitness of the roads, but no order of the Justices was given in evidence. Upon objection taken to the non-production of the order the Court decided that if proof of the order was necessary it might under the maxim *Omnia praesumuntur rite acta* be presumed that it had been made. The decision was merely illustrative of this maxim and can have no bearing upon the question in this case.

The maxim applies when from evidence given, as in Williams vs. Eyton, it is shown that an act is required to be done that is necessary to complete another act required to be performed, which latter act has been performed. Now presuming that a deed from Alexander Graham did exist and has been lost it was not necessary to the validity of that deed that it should contain a limitation to the separate use of Jane Hall, nor was it the duty of the grantor to insert such a limitation, and it is impossible to see how under such circumstances the presumption contended for can arise.

The case so cited does not support the position taken, nor in my opinion can the fact that Isaac Hall did not interfere with his wife in the use of this land and did not receive any rents and profits from it, afford any ground for creating the presumption that it was held by her for her separate use in the sense in which those words are understood by a Court of law and equity.

Upon the question of the equities being in favour of the Plaintiff. I can see none arising in his favour. His kindness to the deceased (Jane Hall) does not create such and that is all that was urged by his Counsel, and it was this which no doubt induced her to wish to give the Plaintiff this property, but which as he swore he afterwards paid her for.

Having come to the conclusion that the evidence before me, and the circumstance of the non-interference by the husband in the enjoyment of this land by Jane Hall, taken to be proved,

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would not justify me in presuming that the paper sworn to was drawn by a lawyer and that it contained a limitation of the property claimed to the separate use of Jane Hall, the only remaining point is whether the deed from her to the Plaintiff is a valid deed, and sufficient to vest this land in him.

Having decided that she was not entitled, according to the evidence, for her separate use, then the usual incidents to the holding of real property otherwise by a married woman attach.

It is shown that she came into possession of this land either in 1855 or 1866 before the commencement here of the Married Women's property Act 1884.

It is admitted that she was married to Isaac Hall in 1874.

Therefore the mode of conveying the property of a married woman situated as Jane Hall was should have been adopted viz. by a deed to which her husband should have been a party and which should have been acknowledged by her in accordance with the statutes regulating the disposition of the real estate of married women, married and being possessed of such prior to the Act of 1884.

This has not been done and therefore according to the authorities her deed to the Plaintiff is not sufficient to pass the property to him and he cannot maintain this action.

I give judgment for the Defendant with costs.

Counsel for Plaintiff—*C. Rees-Davies*.

Counsel for Defendant—*Malcolm*.

MAGISTRATE'S COURT.

COMMANDANT OF CONSTABULARY vs. HERCULES PINDER.

Unlicensed cart—"Plying for hire"—Meaning of term—Bahamas Act 51 Vic. c. 7. (The Drayman's Act 1888.)

1899

JAS. M. RAE, ESQ., S. & C. M. The defendant was charged with a breach of Section 1. of 51 Victoria chapter 7 by unlawfully plying an unlicensed cart for hire.

The facts of the case—the result of admissions entered in to by the Commandant and the Counsel for the defence in order that the only point at issue should be the meaning of “ply for hire”—were as follows :

Pinder is under contract to supply carts to Mr. McDonald, the Architect of the Hotel Colonial. No one else has the use of the carts. Payment is made fortnightly—some of the carts are paid by the day, others by the load.

The Commandant contended that these circumstances constituted a “plying for hire” within the meaning of the Act. The Act contemplated the licensing of all carts other than carts used for farm purposes. Farm carts are the only ones specifically exempted, therefore all others have to be licensed.

Malcolm, in defence, contended that the Act was not intended to place all drays or carts—other than those used in connection with a farm—on an equal footing by requiring them all to be licensed. The Act was passed *alio intuitu*. It was intended to supply and regulate a body of hackney carts subject to the control of the police. Notice the minute provisions as to numbering and naming—the badge and dress of the driver—the tariff of charges and amount of load—and specially that the public is given the right to insist on the services of an unlicensed cart.

The circumstances of the case do not constitute a plying for hire within the meaning of the Act. There must be a soliciting of custom without previous contract. Our Act gives no definition of the term, but in England judicial decision has affixed a definite meaning to it. Counsel cited cases to show that these

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words had been held to mean that the vehicle must be at the disposal of any one of the public who might think fit to hire it—that it could not be said to be plying for hire unless ready at any moment to be hired by anyone of the public.

The case was tried before His Worship Mr. Stipendiary and Circuit Magistrate Rae on the 15th inst. Judgment was reserved until the 20th, and was then to the following effect :

The term “ply for hire” in section I. of the “Drayman’s Act, 1888,” under which the charge is prosecuted, is not defined in the Act. The same term is used in the English Hackney Carriage Acts, from one of which it was probably taken by the fram-
er of our Act.

The two cases cited by Counsel for the defendant—Case *vs. Storey*, and *Allen vs. Tunbridge*, as also the case of *Clarke vs. Stanford* reported in Law Reports 6 Q. B. 357, were under the Hackney Carriage Acts, and are decisions of the Superior Courts upon “cases stated” on appeal, by the Magistrates before whom the original hearing took place. In these cases it was held by the Appellate Courts that the term “ply for hire” means “being at the disposal of any one of the public who may think fit to hire,” the vehicle. * * * “Ready at any moment to be hired by any one of the public.”

In the present case, the evidence submitted establishes the fact that the cart in question had been let by the defendant Pinder, under a specific contract, to the builders of the Hotel Colonial only, and had not been at the disposal of the public for hire. This, according to the decisions mentioned was not a plying for hire. The charge is therefore dismissed.

Counsel for defendant—*Malcolm*.

MAGISTRATE'S COURT.

JAMES RONALD CLERIHEW YOUNG AND ANOTHER
TRADING AS "THE BAHAMAS IRONMONGERY COM-
PANY" vs. THE NEW YORK AND CUBA MAIL STEAM-
SHIP COMPANY.

*Ship and Shipping—Bill of Lading—Shipowner—Liability of—Negli-
gence—Onus of proof.*

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JAS. M. RAE, ESQ., S. & C. M. This action is brought to recover the value of two iron bedsteads and two woven wire mattresses shipped at New York in the defendants' steamer "Saratoga" for the Plaintiffs, and which were landed here in a damaged condition.

The defendants by their statement of defence deny that the goods were delivered in a damaged condition, and they aver that the alleged damage (if any) was in consequence of the bedsteads and mattresses not having been packed "in board or crating."

The Bill of Lading was signed by the defendants' agent in New York on the 18th July last. The ship arrived at Nassau on the 23rd July, but although other goods mentioned in the same Bill of Lading were landed here, the bedsteads and mattresses were carried on to Cuba, and were brought thence to Nassau in another steamer of the Ward Line—the "Niagara"—on the 22nd August. On being landed, some of the railings of the bedsteads were found to be bent and broken, and several of the castors were knocked off. The goods had been crated, but were wrapped with excelsior and paper.

The Plaintiffs' drayman at first refused to receive them on account of their damaged condition, but at the instance of the Agents' delivery clerk, who said that he would see Mr. Sutton (one of the plaintiffs) about them, he received the goods, signed a receipt, and delivered them at the plaintiffs' premises. This receipt is on a form supplied by the defendants, on which is printed the words "Received in good order," but it is in evidence that the goods were damaged when landed.

They were afterwards inspected at the plaintiffs' premises by Mr. R. W. Sawyer of the firm of R. H. Sawyer & Co., (Ward's Agents in Nassau) who expressed the opinion that they were not

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properly packed. He stated, however, that he would communicate with the Ward Co. on the matter. The latter afterwards repudiated any liability for the damage sustained.

During the hearing, many witnesses were examined who proved that though iron bedsteads shipped from England are invariably packed in wooden crates, those shipped from New York are sometimes crated, but are more frequently shipped with excelsior and "burlaps" (bagging) wrapped around them, or, as in the present case, wrapped with excelsior and paper, the burlaps being omitted.

At the close of the plaintiffs case, Mr. Thompson, counsel for the defendants, moved that judgment be given for his clients on the ground that there was no evidence before the Court of negligence on their part and the *onus probandi* was on the plaintiffs, citing in support the case of the "Helene" reported in Law Journal Reports, N. S., vol. 35, Pro. & Admty. p. 63.

Mr. Malcolm, counsel for the plaintiffs, in reply, contended:

1st. That by the Bill of Lading the defendants admitted that the goods were received on board their ship in "apparent good order," and it was for them to prove affirmatively that they had taken good care of them.

2nd. That there was evidence of negligence, the goods having been landed in Cuba and shipped thence to Nassau, which involved a large amount of unnecessary handling and consequent risk.

He also cited The "Helene," as well as Czech vs. the Gen'l Steam Nav. Co., L. R. 3 Com. Pleas, p. 14.

Taylor vs. The Liverpool and Great Western Steam Co., L. R., 9 Q. B., p. 546.

The "Peter der Grosse" L. R. 1 Pro. Div. p. 414.

The "Figlia Maggiore," L. R. 2 Admty. p. 106.

The "Freedom," L. R., 2 Admty. p. 346.

The "Waikato," L. R., (1899) 1 Q. B. Div. p. 56.

I refused the motion.

The defendants then entered upon their evidence, which in the main was not in conflict with that of the plaintiffs. It

was admitted that the goods had been landed at Cienfuegos—the "Saratoga's" final outward port—and that there were intermediate ports of call in Cuba. That they were not sent to Nassau in the "Saratoga" on her return trip from Cuba, but were shipped by the "Niagara" two weeks later.

It appears from Mr. Sawyer's evidence that no particular space, or part of the ship, is assigned for Nassau freight when a steamer is loading in New York; but that the Cuba freight is nearly as possible all put in the ship before the Nassau freight is received. That on arrival at this port, "three Watchmen are employed on board the steamers to see that no cargo, other than that for Nassau, is discharged here; and also to look out for cargo intended for this port." Notwithstanding this, it frequently happens that goods shipped for Nassau are over-carried to Cuba.

The Bill of Lading has a number of Clauses, but there are three which were specially referred to as affecting the present case viz. 3, 13 and 19 and are as follows:

"3. It is also mutually agreed that the carrier shall not be liable for loss by leakage or damage incident to the transportation of butter, lard, oils, grease, tallow etc., or similar goods; nor for weight, leakage, breakage, shrinkage, rust, loss or damage from insecurity of packages &c."

"13. Also, in case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity when found, at the Company's expense, the steamer not to be held liable for any claim for delay or otherwise."

"19. It is also mutually agreed that nothing herein shall be construed to exempt the vessel, its owners, master, or the agents, or manager, from any liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery of said goods, and that this shipment is subject to the terms and provisions of the Act of Congress of the United States, approved on the 13th day of February, 1893."

It was contended by the defendant's Counsel, first that the damage to the bedsteads was in consequence of the "insufficiency" of the packing, and therefore that under clause 3 the defendants were not liable; citing Richardson vs. the North Eastern Railway Co. Law Reports 7 Common Pleas p. 82 and Stuart vs. Crawley (2 Stark p. 323) referred to in that case.

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2nd. That the over-carrying of the goods to Cuba is covered by clause 13 of the Bill of Lading.

3rd. That the goods having been received by the Plaintiffs through their Agent or Servant (the Drayman) this action will not lie.

For the Plaintiffs it was urged.

1st. That clause 3 of the Bill of Lading exempts the defendants from liability for loss or damage caused by "insecurity" of packages—not "insufficiency."

2nd. That if the packing of the goods was insufficient, it was a visible defect and therefore the defendants are liable.

3rd. That the defendants cannot now avail themselves of the receipt by the drayman, that defence not having been raised in their statement of defence.

4th. That the goods when found were not forwarded by the first opportunity to Nassau, as provided in clause 13.

The two cases above cited by the defendant's counsel, were referred to by Mr. Malcolm in support of the second ground.

This case is one of much importance, not because of the value of the property, but of the legal questions it involves. My attention has been directed by both the learned counsel engaged to numerous authorities, all of which have had my careful consideration, and I am clearly of the opinion that the exceptions in the Bill of Lading will not include damage that may have been caused through the negligence of the carriers. Apart, however, from the legal authorities on this point, it is expressly stipulated in clause 19 of the Bill of Lading, that the vessel and owners are not to be exempted from liability for loss or from damage arising from negligence.

Is there then evidence of negligence in the defendants.

In the case of the "Freedom" (Law Reports 2 Admty p. 349) Sir R. Phillimore said "It is to be borne in mind that if the fact of the damage be established by the plaintiffs, the burthen of proving affirmatively that such damage was the consequence of the excepted perils, lies unquestionably upon the defendants; and I think that the burthen of proving affirmatively that due care was taken of the goods also lies upon them."

The same learned Judge said in the case of the "Peter der Grosse" (Law Rep. 1 Pro: Div. p. 420) "If the plaintiffs have shown by prima facie evidence that having put these bales and bags in good order on board the ship, they were taken out in bad order both externally and internally, I agree with the observation which was made, that it is not incumbent on them to shew either how or when the damage was done.

In the present case there can be no doubt that the damage to the goods occurred during the carriage. The Bill of Lading is prima facie evidence that they were received on board the "Saratoga" in apparent good order. They were landed here from the "Niagara" in a damaged condition. Have the defendants proved affirmatively that due care was taken by them of these goods? I cannot find that they have. They attribute the damage to improper or "insufficient" packing, but it is in evidence that bedsteads similarly packed are frequently brought from New York to Nassau in safety.

Here I may say it appears to me only reasonable to suppose that what would be sufficient packing for this voyage, might prove totally inadequate when four ports in the Island of Cuba and a return voyage to Nassau are added.

Clause 13 of Bill of Lading provides that "goods which cannot be found for delivery during the steamer's stay at the port of destination, are to be forwarded by the first opportunity when found." Now if due care had been taken of these goods by the defendants, why were they not forwarded to Nassau by the Saratoga on her return from Cuba.

In dealing with the question of insufficiency of packing, the cases of *Richards on vs. The North Eastern Railway Co.* and *Stuart vs. Crawley* are of much assistance for they are directly in point.

The distinction made in the two cases establishes that when the defect is patent or visible, the defendant cannot set up that defect as a defence. Therefore assuming that the packing was insufficient as alleged by the defendants, it was a defect that was plainly to be seen. There were neither crates nor burlaps used, and the defendants having received the goods, packed as they were with excelsior and paper only, I think they were bound to deliver them as they were received.

In the case of *Walker vs. Jackson* (12 Law Journal Rep: N. S. Exch. 167) cited by Willis J. in *Philips vs. Clark*, Parke

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B. said "if anything is delivered to a person to be carried, it is the duty of the person receiving it to ask such questions about it as may be necessary ; if he asks no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is."

The contention that the receipt of the goods by the plaintiff's drayman was their receipt and bars them of any right to bring this action I do not think tenable. As objected by their Counsel, this defence is not contained in the statement of defence filed by the defendants. But apart from this, the drayman called the attention of the delivery Clerk to the damaged condition of the goods and refused to receive them, and it was only after the latter promised to see the Plaintiffs about them, expressing the opinion at the same time that "the ship was not liable," that the drayman received them. This should not in my opinion bar the plaintiffs of their action.

I give Judgment for the plaintiffs with cost.

Counsel for Plaintiffs.—*Malcolm.*

Counsel for Defendants.—*Thompson.*

MAGISTRATE'S COURT.

THE COMMISSIONERS OF THE NEW PROVIDENCE ASYLUM vs. THOMAS A. ROKER.

JAS. M. RAE, Esq., S. & C. M. This action is brought under Sections 26 and 27 of the Asylum Act 1904 to recover from the defendant the sum of £1 5s. viz: twelve shillings for Medical attendance on, and thirteen shillings for medicines supplied to, Mrs. A. Roker, the defendant's mother, in September and October last past.

1905

The sections mentioned are designed to compel the parent, child, or husband of a person who shall have been admitted to the Asylum or received out door relief to contribute to the maintenance of such person according to their several abilities. This provision in the law is not new, the Asylum Act of 1876 having contained a clause similar in effect.

Under the last mentioned Act, Medical Relief was granted to an applicant upon the production of a certificate from a Minister of Religion. Under the new Act the office of Relieving Officer was created, to whom the application must now be made, and his duty is, in cases not deemed "urgent," to make all necessary enquiries and to report to the Relief Committee, to whom the application must be referred at its next meeting. If he is doubtful as to the urgency of the case, he is to refer it to the Assistant Surgeon or Resident Surgeon Superintendent for his report. "Urgent cases" he shall refer to one or other of the Surgeons mentioned.

The defendant and his mother do not reside together, but he provides her with a residence and maintenance. On the 1st September last she was ill and he employed a physician who attended her 3 or 4 days, by which time medical attendance was no longer necessary.

On the 27th of the same month Mrs. Roker was again taken ill and immediate medical attention was thought necessary. The defendant was not informed, but instead, she request-

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ed the Rev. W. Lowndes, in whose Parish she resides, to furnish her with a certificate to obtain medical relief from the Asylum. The Reverend gentleman not being aware of the change that had taken place in the law, gave the certificate he had been accustomed to give. This was sent to the Asylum by a messenger who returned with a notification under the new law, that the application would be referred to the Relief Committee at its next meeting. Feeling that the case required immediate attention, Mr. Lowndes repaired to the Asylum where he had an interview with the Relieving Officer, who informed him of the new mode of dealing with applications for medical relief; and that Mrs. Roker's application would be dealt with as had been indicated. Thereupon he informed the Relieving Officer that he would himself send a physician to Mrs. Roker, and would endeavour to recover from the Asylum Commissioners the expense he might be put to. He accordingly requested the Hon. J. B. Albury, M.D. to visit Mrs. Roker.

Meanwhile the Relieving Officer, owing to Mr. Lowndes's representations had referred the case to the Chairman of the Asylum Commissioners who is also chairman of the Relief Committee, and who directed him to consult the Acting Attorney General, with the result that the case was referred to the Assistant Surgeon. This officer visited Mrs. Roker at her residence on the same day, but having found that a private practitioner had already attended the case, he retired without performing any medical service. A fee of 4 shillings is charged for this visit.

In an interview he subsequently had with the physician mentioned the Assistant Surgeon understood him to say that he had been requested to make but one visit. In this however he was mistaken for two visits were in fact made. However, in the belief that one visit only had been made, and feeling anxious to know Mrs. Roker's condition, the Assistant Surgeon made a second visit on October 2nd, and found that she did not require further medical attendance. He prescribed a tonic for her which was supplied from the Asylum. Four shillings was charged for the visit and three shillings for the tonic.

On the 12th October Mrs. Roker again applied for Medical Relief. The application was at once referred by the Relieving Officer to the Assistant Surgeon, who visited her on the same day and gave her a new prescription, the medicine being supplied from the Asylum. Four shillings is charged for this visit and 5s. for the medicine. No further attendance was deemed necessary, but the medicine was renewed with a further charge of 5s.

The defendant was now presented with a bill for the above charges which he refused to pay, and the present action was brought.

I feel bound to say that the case, which is the first to come before this Court under the new Act and the Rules made thereunder, is not very satisfactory.

Why the application was made to the Asylum without reference to the defendant who was maintaining his mother, and had so recently before supplied her with Medical aid does not appear, except that Mr. Lowndes said that he did not know where to find defendant, and further that he "deemed Mrs. Roker a proper person to receive medical relief from the Asylum." Upon learning that this was not to be granted until the application had been referred to the Relief Committee on a future day, and believing that Mrs. Roker's case required prompt attention, Mr. Lowndes who had furnished his certificate in ignorance of the new conditions, himself supplied a physician, and no fresh application was made for relief until October 12th.

Under Rule 72 part of the duty of the Relieving Officer is thus laid down.

"After receiving any application for any relief of any description, whether medical or otherwise, and whether the same shall have been immediately dealt with or not, the Relieving Officer shall forthwith examine into the circumstances of the case by visiting the house of the applicant and by making all necessary inquiries as to the condition and family, the property and means of livelihood of the applicant and his family, and all other matters on which information may be useful to the Commissioners."

The Relieving Officer did not carry out this rule. It was urged by the Attorney General that the omission was a detail that does not effect the case, the object of the rule being that the Relieving Officer should be enabled to ascertain whether there is any relative who can be made liable to contribute under the Act for the relief granted. With due deference to the learned Attorney General, I cannot concur in this view of the rule. The relative was liable to contribution before the office of Relieving Officer existed, and bearing in mind that the object sought to be accomplished by the creation of the office, is to ensure an efficient discrimination and control in the granting of public charity, I cannot but hold that the rule is primarily and essentially for the purpose of ascertaining whether the applicant is a fit

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subject to receive the relief sought. The ability of a relative to contribute is in my opinion auxiliary.

Had the rule been observed it is quite possible that the relief asked for would not have been found necessary.

In the present case I am not prepared to go the length of saying that because the rule was not observed, the Plaintiffs shall not recover ; but I have thought it expedient to express my opinion as to the necessity of so important a rule being regarded in the future. The relief was granted and the defendant's mother received it, therefore upon proof that he is able to contribute, he is liable. His ability is not denied. The visit of the 27th September I am of opinion should not be charged for. The price of the medicines supplied (one bottle at 3s. and two bottles at 5s. each) seems to me to be excessive, although there is no evidence as to their value. Under the Act however the Magistrate is to order the relative " to contribute such sum . . . as such Magistrate in his discretion may deem reasonable in view of the circumstances of the case." I therefore order that the defendant do pay to the Plaintiffs sixteen shillings and 2s. and 9d. cost.

Counsel for Plaintiffs—*Bertram, Attorney General.*

